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THE

MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

By R. S. MORRISON,
OF THE COLORADO BAR.

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MINING REPORTS.

VOL. II.

HOBART V. WICKS ET AL

(15 Nevada, 418. Supreme Court, 1880.)

Water rights—Diverting at different points. Defendants appropriated the water of Alder creek at a certain point in 1868, and in 1872 constructed a branch flume at another point higher up the creek and appropriated the waters thereof at this point also, sometimes diverting the water through one flume and sometimes through the other. Still later the plaintiffs purchased the land on the creek between the two points of diversion, but the land was vacant until after defendants had appropriated the water at both places. *Held*, that defendants owned the water and might divert it now at one point and now at the other.

Appeal from the District Court of Washoe County, Second Judicial District.

The land owned by plaintiff is not agricultural or grazing land; but is valuable only for the timber growing upon it. On the ninth day of October, 1873, the land was patented by the State of Nevada, and granted, by its patent, to the grantor of plaintiff. Alder creek flows in its bed and channel through, over, and upon the lands of plaintiff. Plaintiff never appropriated or used the water of Alder creek for any purpose whatever, and has not any use therefor. The water, when flowing through plaintiff's land in the channel of the creek, does not irrigate the land, or make it productive. The plaintiff does not use, or require, the said water for irrigating, or for stock, or domestic purposes.

ELLIS & KING, for appellant, who was plaintiff below.

R. M. CLARKE, for respondents.

BEATTY, C. J.

This is a suit to enjoin the diversion of a stream of water from its natural channel upon and across the lands of the plaintiff.

The cause was tried in the district court, without a jury, and a judgment rendered in favor of the defendants.

The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The only point made in support of the appeal, is that the conclusions and judgment of the district court are against the findings of fact, and not supported thereby. The material findings of fact are, that the defendants and their predecessors in interest appropriated the waters of Alder creek, in 1868, for the purpose of operating a V flume for the transportation of wood, lumber and timber from the mountains to a point on the Pacific railroad near Bronco, in Washoe county. In that year they diverted the water from the creek into their flume at a point below the lands now owned by the plaintiff. Subsequently, and prior to July, 1872, they constructed a branch flume extending further up the stream, and in that month diverted the water of the creek into said branch flume at a point above the lands now owned by plaintiff. Since the year 1872, defendants have continued to use both the original flume and the branch flume as their business required, sometimes diverting all the water at the original point of diversion, and at other times diverting it at the point where it was taken out in 1872.

The plaintiff became the owner of the lands lying on the creek between the two points of diversion in 1873, after the appropriation of the water by the defendants, and after they had begun to divert it at the upper point, and to use it, as it was convenient to them, to operate either the old flume or the branch flume. Prior to that time said lands were vacant and unoccupied timber lands belonging to the United States.

Upon these facts it is adjudged that the defendants are owners of the water of the creek and entitled to use it, and the whole of it, during the ordinary stages of its flow, for the

purpose of operating their flumes and the ditches connected therewith.

We can not see that the decree awards to the defendants any greater right than the facts above stated entitle them to. They had acquired by appropriation the right to all the water in the stream before the plaintiff purchased his lands, and while they were still the property of the United States. Defendants had not only appropriated the water for their original flume, but they had constructed their branch flume and commenced the practice of diverting the water from the channel of the stream at the upper as well as the lower point, as their convenience dictated. If they had a right to do this before plaintiff's purchase—and we see no reason for denying such right—then he has no reason to complain that they continue the practice. What they were doing in 1873, at the date of plaintiff's purchase, they were doing with the express permission of the United States (Stat. July 26, 1866, Sec. 9), the then owner of the lands, and plaintiff took subject to their right.

We do not agree with counsel for appellant that there is anything inconsistent in the claim of defendants to divert the water now at one point and now at the other. It may be necessary, and presumably is necessary, to do so in the proper conduct of their business.

The judgment and order appealed from are affirmed.

THE HIGHLAND DITCH CO. v. MUMFORD.

(5 Colorado, 325; 1 Colorado L. R. 278. Supreme Court, 1880.)

Water rights. Purchaser of ditch partially constructed takes subject to servitude contracted by grantor.

Appropriation—Diligence. To constitute due diligence does not require unusual efforts or expenditures, but only such constancy in the pursuit of the undertak ng as is usual with those in like enterprises—such assiduity as shows a *bona fide* intention to complete it in a reasonable time.

Distribution of water among colonists and mode of measurement of water stated, in the agreed case and in the opinion of Beck, J., which was affirmed.

Appeal from District Court of Boulder County.

Messrs. WRIGHT & LOGAN, for appellant.

Mr. B. L. CARR, for appellee.

This action was submitted upon an agreed statement of facts. It was also stipulated and agreed, "that the judgment of the court shall decide this action; that the defeated party shall have sixty days from notification of the decision of the court in which to take an appeal, file bill of exceptions and undertaking."

The bill of exceptions shows that the cause was submitted to the court without the intervention of a jury, and is, omitting the formal parts, as follows:

"The said parties hereby agree upon the following statement of facts, and submit the same to the court for the determination of the points in controversy hereinafter specified:

"That on or about the first day of February, A. D. 1871, The Chicago-Colorado Colony was incorporated under the laws of the Territory of Colorado; that the objects for which said corporation was formed were: To aid, induce and encourage immigration to the Territory of Colorado; to secure lands for colonization purposes and locate colonists thereon, and to construct irrigating ditches for supplying said lands with water; that the price of a membership in said colony was one hundred and fifty-five dollars, and each membership entitled the holders thereof to a tract of land or certain town lots, such as might be selected by the member with the consent of the Colony trustees; that in the early part of the year 1871, said Chicago-Colorado Colony commenced the survey of an irrigating ditch, commencing at a point near the mouth of St. Vrain Canon, and running easterly as near the divide between St. Vrain and Little Thompson Creeks as practicable, for a distance of about twenty miles, for the purpose of irrigating certain lands of said Colony, and of the members thereof; that during the spring and summer of 1871 said survey was completed, and during the winter of 1871 and 1872, the work of construction of said ditch was commenced, and during said time grading equal to about four or five miles of said ditch, eighteen feet wide by three feet deep, was done; that said ditch was known as the Colony ditch, and was designated by the name of "The Excelsior Ditch"; that during the month of January or February, 1871,

the plaintiff purchased a membership in said Colony, and about the last of February or the first of March, 1871, he settled upon the east ½ of southeast ¼ section 22, township 3 north, range 69 west, and occupied the same as a homestead under the laws of the United States; that before locating said homestead the plaintiff consulted one of the trustees of said Chicago-Colorado Colony with reference to said location, who informed the plaintiff that all or nearly all of said land could be irrigated from the Colony ditches, and the plaintiff was induced to make said location by reason of said information, and by reason of the proposed construction of said ditch, and another Colony ditch known as the north branch of the Pleasant Valley Ditch; that on the 18th day of July, A. D. 1871, the plaintiff obtained from the said Chicago-Colorado Colony a deed in writing, of which the following is a copy:

"This deed, made this 18th day of July, A. D. 1871, between the Chicago-Colorado Colony of the first part, and Joseph M. Mumford, of the county of Boulder and Territory of Colorado, of the second part, witnesseth: That whereas, the said Joseph M. Mumford hath, in accordance with the provisions of the by-laws of said Chicago-Colorado Colony, taken from the United States under the homestead laws thereof, the east ½ of the southeast ¼ of section twenty-two (22), in town three (3) north, and range sixty-nine (69) west, in lieu of colony lands on membership No. 274. Now, therefore, the said Chicago-Colorado Colony grant, bargain, sell and convey unto the said Joseph M. Mumford, the right to take and use, under such regulations as may be adopted for the distribution of water from the Colony ditches, so much water as may be necessary, year after year, to irrigate and farm said above described tract of land. Provided, nevertheless, that this right shall be subject to such assessments as may hereafter be levied upon memberships for repairing and enlarging ditches.

In witness whereof, two of the trustees of the said Chicago-Colorado Colony have hereunto set their hands and the seal of said Colony, the day and year first above written.

(Signed) ENOCH J. COFFMAN,
SETH TERRY,
Trustees."

"(Colony Seal.)

That said deed was duly acknowledged before a notary public in the ordinary manner of acknowledgment of deeds, and on the 15th day of August, 1871, said deed was filed for record in the office of the county clerk and recorder of Boulder county, and duly recorded in the records of said county. That at the time of the execution of said deed, the said Excelsior ditch was one of the Colony ditches mentioned in said deed, and the only Colony ditch capable of irrigating about seventy acres of plaintiff's said homestead, and it was the intention of the said Chicago-Colorado Colony by said deed to convey to the plaintiff a right to take water from said Excelsior ditch whenever the same should be completed. That on or about the 4th day of April, 1872, the defendant was organized as a corporation under the laws of Colorado; and that on or about the 1st day of October, 1872, the said Chicago-Colorado Colony made an agreement with the defendant to transfer said Excelsior ditch to defendant, the said Highland Ditch Company. That the defendant took possession of said ditch under said agreement, and continued the work of construction during the winter of 1872 and the spring of 1873, and on or about the 1st day of April, 1873, turned the water of St. Vrain creek into said ditch, through a headgate 18 feet wide by 3 feet high, and from that time to the present, said defendant has been in possession of said ditch and has been engaged in the business of selling water for irrigating purposes to persons living under the line thereof.

That on the 21st day of March, 1873, the defendant received from the said Chicago-Colorado Colony, a deed in writing, of which the following is a copy:

"This deed, made this 21st day of March, in the year of our Lord one thousand eight hundred and seventy-three, between The Chicago-Colorado Colony, of the county of Boulder and Territory of Colorado, of the first part, and the Highland Ditch Company, of the county of Boulder and Territory of Colorado, of the second part, witnesseth: That the said party of the first part, for and in consideration of twenty-five hundred (2,500) dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, released, sold, conveyed and quit-claimed, and by these presents do remise, sell,

convey and quit-claim unto the said party of the second part, its successors and assigns forever, all the right, title, interest, claim and demand which the said party of the first part has in and to the following described property, situate, lying and being in the county of Boulder and Territory of Colorado, to wit:

"The ditch formerly known as the 'Excelsior Ditch,' taken out of the St. Vrain Creek in the St. Vrain Canon, and running easterly as near the divide between the St. Vrain and Little Thompson Creeks as practicable, together with the right of way for said ditch over all lands owned by the said party of the first part, and the cabin and such tools as were purchased for the construction of said ditch, and are now on hand; to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining, and all the estate, right, title, interest and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever.

In witness whereof the said party of the first part has hereunto set its signature and affixed the corporate seal, by the hands of its President, the day and year first above written.

(Signed) CHICAGO-COLORADO COLONY,
By RIENZI STREETER,
President.

Countersigned,
CHARLES E. DAY,
Secretary C. C. C.

{Corporate seal of Chicago-Colorado Colony.}

That said deed was duly acknowledged before a notary public, by said Streeter, as the free and voluntary act of said Colony, in the usual manner of the acknowledgment of deeds. That the same was filed for record in the office of the county clerk and recorder of Boulder county, on the 31st day of May, 1876, and duly recorded in said office. That both of said deeds hereinbefore set forth were made and executed pursuant to and in accordance with the order and authority of the board of trustees of said Chicago-Colorado Colony. That the defendant has expended in the work of construction on said Highland

Ditch the sum of thirty-six thousand dollars. That said ditch is of the same width as was originally contemplated, and partly constructed by said Chicago-Colorado Colony, and that its running capacity is nine thousand inches of water. That no assessments have ever been made upon the memberships of the Chicago-Colorado Colony for repairing or enlarging said ditch, and the expense of construction incurred by the defendant was paid out of the proceeds of the capital stock of said Highland Ditch Company. That the market value of said stock is the par value thereof. That since the time the water was first turned into said ditch, the defendant has sold water therefrom to the amount of twenty-six thousand nine hundred and fifty-four dollars. That of this amount six thousand four hundred (6,400) dollars have been expended in the improvement of the ditch and in payment of the ordinary running expenses, and the balance, $20,500.00, has been paid in dividends to stockholders, and remains as assets in the hands of said company, and that no assessments have ever been made by said company for repairing or enlarging said ditch over or above the amount of its capital stock, and that no assessment has ever been made upon or demanded of the plaintiff, and no contribution of any kind, either by the Chicago-Colorado Colony or the plaintiff, for repairing, enlarging or operating said ditch. That the plaintiff is a stockholder in said Highland Ditch Company, and receives dividends upon his stock the same as other stockholders. That no regulations were ever established by the Chicago-Colorado Colony concerning the distribution of water from any of the Colony ditches. That the regulations of the defendant governing the distribution of water from its ditch are as follows, to wit:

'Water will be sold to stockholders only.

The water sold shall be measured from the company's boxes without water-pressure above the top of the aperture, on the inside of the box from which the water is measured.

Water to be paid for by the inch at such price as the trustees may determine.

The water-boxes to be at all times under the control of the water master, and he to act under the direction of the trustees.

Persons desiring to use water must apply for it on or before the fifteenth day of April, each year.

The company will not be responsible for damages for lack of water in the creek.

Whenever there is a lack of water in the ditch, owing to scarcity of water in the creek, stockholders who may have purchased water, shall be entitled to take seven inches of water for each share of stock, and the balance shall be divided among persons purchasing water in proportion to the amount purchased.'

That during the irrigation season of 1877, plaintiff purchased from defendant, for the use of his said homestead, ninety (90) inches of water; that he paid ninety dollars therefor, by executing his promissory note to the defendant for the sum of ninety dollars, payable in October, 1877; that said note is still unpaid. That in the spring of 1878, plaintiff demanded of the defendant a sufficient amount of water from its ditch, under his deed, to irrigate his said homestead, year after year, without paying therefor, and that defendant refused to deliver the same, and that plaintiff, during said year, took from said ditch ninety inches of water for said land and paid the defendant therefor the sum of ninety dollars.

That during the irrigating season of 1879, the defendant delivered to the plaintiff, out of said ditch, his proportionate amount of eighty inches of water, at the usual price of seventy-five cents per inch, with the understanding and agreement between the parties, that if the judgment in this suit shall be against the right of the plaintiff to take water under his said deed, then the plaintiff should pay for the amount actually delivered, but if judgment in this case be in favor of plaintiff's right to take water, then the defendant should take nothing for said water. That the defendant actually delivered to the plaintiff, under said agreement, forty inches of water, worth thirty dollars. That the average amount of water necessary to irrigate that portion of plaintiff's said land, lying under said ditch, is seventy (70) inches, year after year, according to the system of measurement now in use by the defendant.

The points in controversy, and upon which the decision of the court is asked, are as follows, to wit:

First. The plaintiff claims the right to take and use water

from the said ditch sufficient to farm and irrigate seventy acres of his said land, subject only to the law relative to distribution of water in times of scarcity, which right the defendant denies.

Second. The plaintiff claims the right to take water from defendant's ditch, year after year, for the purpose of irrigating his said farm, in quantity averaging seventy inches per year, which right the defendant denies.

Third. The plaintiff demands a judgment against the defendant for the sum of ninety dollars, being the amount paid for water during the year 1878; that the note given by plaintiff for water in 1877, be declared canceled, and that the defendant be ordered to furnish water to plaintiff from said ditch, sufficient to irrigate seventy acres of the said land, year after year.

Fourth. Is the plaintiff bound to comply with the regulations of the Highland Ditch Company governing the distribution of water from said ditch, as (1st) to the manner of measurement; (2d) as to the control of boxes; (3d) applying for water each year?

Fifth. Has plaintiff the right to take water from said ditch for irrigating said land; and if so, upon what conditions, in what quantity and under what regulations?

Sixth. What right, if any, has the defendant to assess the plaintiff?

I. For cost of construction of said ditch?
II. For contingent and running expenses in the past?
III. For contingent and running expenses in the future?
IV. For value of water delivered, past or future?
V. For the maintenance of the ditch?

Seventh. The defendant demands judgment against the plaintiff for the sum of one hundred and eight dollars, the amount of said note and interest, and for the further sum of thirty dollars for the value of water delivered during the year 1879, and that the plaintiff be perpetually enjoined from interfering in any manner with the defendant's ditch, or asserting any right, title or interest in and to the same.

B. L. CARR,
Attorney for Plaintiff.
WRIGHT & LOGAN, and
R. H. WHITELEY,
Defendant's Attorneys."

Affidavits were filed to the effect that the controversy was real and the proceedings instituted in good faith, to determine the rights of the parties thereto.

Afterward the Hon. William E. Beck, judge of the district court, pursuant to the stipulation, filed his written opinion herein, which was as follows:

"It is the opinion of the court that the rights of the parties to this controversy are as follows:

The plaintiff is entitled under his deed to a sufficient quantity of water from defendant's ditch to irrigate his seventy acres of land, subject, however, to the law relative to the distribution of water in times of scarcity, and subject to the regulations of the defendant pertaining to same subject, which are not in conflict with said law, and which apply equally to all members of said defendant's corporation.

This right of the plaintiff is a perpetual right under his deed from the Chicago-Colorado Colony, his grantor, and the defendant must be held to have purchased with notice of, and subject to the terms of the plaintiff's prior grant.

It follows from this conclusion, that the note executed by the plaintiff to the defendant must be surrendered and canceled, and that the sum of ninety dollars, paid defendant by plaintiff in the year 1878, must be refunded to the plaintiff.

We must hold that the plaintiff is bound to observe all reasonable regulations made by the Highland Ditch Company respecting the distribution of water from the said ditch, manner of measurement and control of boxes, which are of uniform operation upon all the members of said ditch company, and do not tend to deprive the plaintiff of a sufficient quantity of water to irrigate his said tract of seventy acres of land when the ditch contains its ordinary supply of water. It is not, however, necessary for the plaintiff to apply for water each year. The nature of his vested rights may properly be held to constitute an annual continuing application, which the defendant is obliged to recognize and supply.

We can not say that plaintiff has the right to take his quantum of water from the ditch, contrary to the rules and regulations of the defendant, but it is the defendant's duty to make a reasonable arrangement or regulation for supplying water to the plaintiff, similar to the provisions in reference to the mem-

bers of corporations, whatever they may be, and it is the duty of plaintiff to observe said regulations.

In respect to the last question submitted:

What right, if any, has the defendant to assess the plaintiff?

It is my opinion, that inasmuch as plaintiff does not participate with said ditch company, either in profits or losses resulting from the sale of water, so far as the interests held by the plaintiff under the Colony deed are concerned, that no assessment can be made against him, except for the purpose contemplated in his deed from the Colony, which would simply be for repairs or enlargements made after the completion of the ditch. No assessment can be made for water for the seventy acres, for original construction of the ditch, or for running expenses. In respect to obligations of the plaintiff as a member of the defendant's company, no opinion is asked or expressed.

The opinion and judgment are limited to plaintiff's and defendant's rights and obligations under the Colony deed, and the court, being fully advised in the premises as to all matters of fact presented herein, as well as all matters of law pertaining thereto, doth hereby order, adjudge and decree:

I. That the plaintiff has and henceforth may exercise the right to take from the defendant's ditch, year after year perpetually, a quantity of water sufficient to irrigate seventy acres of land; that said quantity is seventy inches annually, and that said water be taken subject to the law now in force or hereafter to be in force, relative to measurement and distribution of water for irrigating purposes, and subject to the right of the defendant corporation to assess the plaintiff for repairs and enlargement of the Highland Ditch made since its completion. That said water be delivered to plaintiff by the defendant, subject only to such laws and such reasonable regulations as may be prescribed by the defendant relative to distribution of water to its members, and that no compensation be required of plaintiff therefor.

II. That the plaintiff have judgment against the defendant for the sum of ninety dollars, and that he have execution therefor.

III. That the note executed by plaintiff to the defendant for water from said ditch in the year 1877, payable in Octo-

ber, 1877, be and the same is hereby canceled and annulled, and the defendant and its assigns are hereby perpetually enjoined from bringing any action thereon.

IV. That the defendant take nothing from the plaintiff for water furnished the plaintiff for irrigating his homestead in the submission herein described, during the year 1879.

And it is further considered and adjudged by the court that the costs of this action be paid by both parties hereto in equal parts, to be taxed by the clerk of this court.

WM. E. BECK, Judge."

To which judgment and decree the defendant, by his counsel, then and there excepted and prayed an appeal.

ELBERT, C. J. At the date of the Colony deed to the appellant, the ditch conveyed stood charged with the servitude created by the Colony deed to the appellee, and the appellant took the ditch subject thereto.

If it could be permitted the appellant to attack the title of its grantor to avoid this servitude, we see no reason, on the evidence in this case, for saying that at the date of its conveyance to the appellant, the Colony Company had acquired no title or property in the ditch in question.

The ditch was to be twenty miles long, eighteen feet wide, and three feet deep. The survey was commenced in the early part of 1871, and completed in the summer of that year. The work of construction commenced during the winter of 1871–2, and four or five miles of the ditch were completed the requisite width and depth.

About the first of October, 1872, the appellant took possession of the ditch under an agreement of purchase.

"To constitute due diligence does not require unusual efforts or expenditures, but only such constancy in the pursuit of the undertaking as is usual with those in like enterprises. Such assiduity as shows a *bona fide* intention to complete it within a reasonable time." *Ophir S. M. Co.* v. *Carpenter*, 4 Nev. 534.

There is no reason for saying that the want of diligence in this case, upon the part of the Colony Company, was such as to prevent the appropriation of the water dating back to the commencement of the work, there being no intervening claimants.

These are the only objections made by counsel to the decree of the court below, and it will be affirmed.

Decree affirmed.

Mr. Justice BECK having, as judge of the court below, rendered the decree therein, did not participate in this decision.

COLUMBIA MINING COMPANY v. HOLTER ET AL.

(1 Montana, 296. Supreme Court, 1871.)

Practice on appeal. On appeal from a judgment, this court will look into the evidence for an explanation of errors assigned.

Diversion of water. Defendants appropriated the waters of Oro Fino Creek in 1865. In 1867 plaintiffs appropriated the same water to operate a mill at a point 1¼ miles above, but returned it to the creek above defendants' dam and ditches. In 1869 defendants diverted the water at a point above plaintiff's mill. *Held*, that the appropriation in 1865 below the site of the mill did not justify the diversion above the mill in 1869.

Appropriation, what constitutes. A declaration of a claim to water, unaccompanied by acts of possession, is wholly inoperative as against those who shall legally proceed to acquire a right to the same. By appropriation a man acquires only the right of possession and user of water, qualified by the right of others to its use, in such a manner as shall not materially diminish or deteriorate it at the place of his appropriation, in quantity or quality.

Appeal from the District Court of Lewis and Clarke County, Third Judicial District.

Action for damages for diversion of water with prayer for injunction. Verdict and judgment for defendants. Plaintiffs appeal. The facts appear in the opinion.

W. F. SANDERS and CHUMASERO & CHADWICK, for appellants.

E. W. and J. K. TOOLE, for respondents.

WARREN, C. J.

This is an action for damages, for diversion of the waters of the west branch of Oro Fino Creek, by defendants, and pray-

ing a perpetual injunction against them. The answer does not sufficiently deny, under the well established rules of pleading, any material allegation of the complaint, but sets up a prior appropriation, by grantors of defendants, under which they justify the diversion.

The cause was tried before a jury, who found a general verdict for defendants, and also a special verdict. Appellant moved the court to set aside the general verdict, and for a judgment and decree of injunction upon the special verdict, which was overruled, and a judgment rendered for defendants, and a dissolution of the restraining order in force. Appellant appeals from the judgment, and among other errors assigns this action of the court, and embodies the evidence in his statement. On appeal from a judgment, this court will look into the evidence for an explanation of errors assigned, and we are of opinion that the evidence preserved in this case, in connection with the pleadings and the special findings of the jury, disclose error in entering the judgment under the general verdict.

The jury find, specially, that defendants' grantors appropriated the water in question, in October, 1865, and that the point at which they diverted it from its channel was one mile and a quarter below Unionville. They also find that the grantors of plaintiff appropriated said waters in September, 1867, and that they took possession of same at a point about one hundred yards above the mill of the Columbia Mining Company. The evidence, explanatory of this finding, shows the facts to be that defendants derive title through one Laird, who, in October, 1865, posted a written notice on the creek, claiming all the waters of the creek and its tributaries, for mining and other purposes, and thereafter with due diligence erected a dam and reservoir at the point where his notice was posted, and constructed ditches and flumes from said point to convey the water for the purposes indicated. That plaintiff's grantors erected their mill and appropriated said waters for its operation in September, 1867, at a point on said creek, one mile and a quarter above the point where Laird's notice was posted, and his reservoir and ditches constructed, and continued thereafter to use such water until May 28, 1869, when defendants diverted the same at a point above plaintiff's mill,

as alleged in the complaint and admitted in their answer. That plaintiff was charged with notice of defendants' claim prior to any appropriation for the purposes of said mill, and to the construction of the mill. That no work was done upon nor water actually diverted from said creek, by or on behalf of the defendants, at any point as high up the creek as the point of plaintiff's appropriation, until after plaintiff's said appropriation, and that plaintiff, after using, returned said water to its natural channel, at a point above any work done by defendants or their predecessors in interest.

There is some evidence concerning an action brought by Laird against one Pearce, for the diversion of the water in controversy in this action, and that a recovery was had by Laird therefor; but, as no privity whatever is shown between Pearce and the plaintiff in this action, or his grantors, the latter is not affected by such proceeding.

Examining the special findings in the light of this evidence, it is clear that the appropriation by defendants' grantors, found to have been made in 1865, at a point below that at which they find plaintiff's appropriation to have been made in 1867, could not justify the diversion made by defendants in 1869, complained of by plaintiff. The notice of Laird's claim was of no validity. An intention to appropriate water, to be effectual as against other parties, must be carried into actual execution with all reasonable diligence, by some known and tangible means, and at some designated point. By appropriation, a man acquires only the right of possession and user of water, qualified by the right of others to its use, in such manner as shall not materially diminish or deteriorate it, at the place of his appropriation, in quantity or quality. A declaration of a claim to water, unaccompanied by acts of possession, is wholly inoperative as against those who shall legally proceed to acquire a right to the same.

The special findings conflict with the general verdict, and the latter must be set aside. The judgment must be reversed and the cause remanded, with directions to the court below to enter a judgment upon the special findings of the jury, for nominal damages in favor of the plaintiff, and a decree for perpetual injunction as prayed in the complaint.

Judgment reversed.

1. The doctrine of appropriation applied to use of water: *Barkley* v. *Tieleke*, 2 Mont. 59; *Post* DITCH; *Barnes* v. *Sabron*, 10 Nev. 217; *Post* DITCH; *Bear R. Co.* v. *New York Co.*, 8 Cal. 327; *Post* DITCH; *Butte Co.* v. *Morgan*, 19 Cal. 609; *Post* DITCH; and cases under DITCH, WATER, IRRIGATION and DAM, generally.

2. Ownership results from appropriation: *Hughes* v. *Devlin*, 23 Cal. 501; *Post* POSSESSION.

3. Appropriation of tailings: *Jones* v. *Jackson*, 9 Cal. 237; *Post* TAILINGS.

4. Rights of prior and subsequent settlers on same creek: *Lobdell* v. *Simpson*, 2 Nev. 274.

5. Distinction in mode of appropriation of land and of water: *Robinson* v. *Imperial Co.*, 5 Nev. 44; *Post* MILL SITE.

6. Appropriation of timber land: *Rogers* v. *Soggs*, 22 Cal. 444; *Post* TIMBER.

7. Rule of "coming to a nuisance" applied to the later appropriator: *Tenney* v. *Miners' Co.*, 7 Cal. 335; *Post* NUISANCE.

8. Extent of appropriation a question for the jury: *Nevada Co.* v. *Powell*, 34 Cal. 109; *Post* DAM.

9. Effect of contract, prior to appropriation of mineral lands: *Murley* v. *Ennis*, 2 Col. 304; *Post* PROSPECTING CONTRACT.

10. Mining claim subject to previous appropriation of water: *Irwin* v. *Phillips*, 5 Cal. 140; *Post* WATER; *Rupley* v. *Welch*, 23 Cal. 453; *Post* DAM.

11. Evidence required to prove appropriation: *Kimball* v. *Gearhart*, 1 M. R. 615.

SPENCER v. KUNKLE.

(2 Grant's Cases, 406. Supreme Court of Pennsylvania, 1853.)

Questions not raised below will not be discussed or considered in the Appellate Court.

Two leases, the first of coal mines, the second of miners' houses on the same premises, the second being made in terms subject to the former, are properly treated as one entire demise.

Miners' houses are ordinary and proper appurtenants to coal mines, and when on the premises and included in the lease, are part of the estate, and all the remedies of a landlord attach to them, even without express stipulation.

Error to the Common Pleas of Schuylkill County.

PARRY, for plaintiff in error.

The opinion states the material facts.

WOODWARD, J.

There was no question raised in the court below, as to the joinder of Gast with Anspach, in the distress, or as to the effect of the tender, and the court expressed no opinion on these points. They are not, consequently, open for discussion in a court of review, and may be laid out of the case. The only question which remains is, whether the court were right in treating the leases as one entire demise, and holding the goods and chattels, or any part of the demised premises, liable for the rent of the houses, as well as for the rent of the coal mines.

We think they were.

This was not the case of distinct and several demises, or of one demise of several distinct and separate tenements.

The second lease is by its express terms, made part and parcel of the first; and both taken together constitute a lease of certain veins of coal and miner's dwellings, on the Warrington tract of land. *The houses now on the premises* and the six new *houses upon* said property are the expressions by which the instruments designate the dwellings; and in respect to

them and the coal veins, it is expressly stipulated that the parties shall stand in the relation of landlord and tenant, and that all laws relating to landlord and tenant shall be considered as extending to this lease and the *estate* created by it, particularly for the enforcing the payment of rent by distress, etc.

Miner's houses are ordinary and proper appurtenants to coal mines, and when they are on the premises, and included in the lease of mines, they constitute part of the estate, and all the remedies of the landlord attach to them, even without the very express stipulation which is contained in this lease.

Without such stipulation the landlord's rights are beyond question.

It is of no importance that the rents for the coal veins and the houses were measurable by different standards. Both were certain and fixed, or easily reducible to a certainty, and it is not pretended that the distress was made for more than was in arrear.

We should violate the terms of the lease, if we denied to the landlord the right to enforce payment of the full arrears of their rent, out of any personal goods on the premises.

The judgment is affirmed.

QUIRK v. FALK ET AL.

(47 California, 453. Supreme Court, 1874.)

Sheriff's deed—Execution. The party relying on a sheriff's deed, must produce not only the judgment and the sheriff's deed, but also the execution under which the property was sold.

Description—Appurtenances. A sheriff's deed purported to convey certain property of the Monitor Company, known as the "Monitor claims," together with appurtenances. *Held*, that the mere fact that the Monitor Company purchased the Ohio Water Ditch and the water rights appurtenant thereto, would not constitute them appurtenances of the "Monitor claims."

Burden of proof. A party who claims certain water rights under a sheriff's deed purporting to convey the "Monitor claims," with appurtenances, has the burden of proof upon him to show that they are so appurtenant.

Appeal from the District Court of Plumas County, Second Judicial District.

Plaintiff appealed from an order denying a new trial. The opinion states the facts.

GOODWIN & HALL, for appellant.

P. O. HUNDLEY and G. C. CLOUGH, for respondents.

By the Court, RHODES, J.

The plaintiff alleges that he is the owner of a certain water ditch, known as the Ohio Water Ditch; that by means of it he and his grantors, since 1852, have continuously diverted and appropriated all the waters of Burg Creek, and that while he was such owner, the defendants diverted the water of Burg Creek from the ditch, and threaten to continue to divert the same. He prays for an injunction to restrain the defendants from further diverting such waters, and for a judgment for the damages sustained by the diversion complained of. The defendants had judgment.

It was admitted that Hollingworth & Clark originally owned the water ditch described in the complaint; and it was proven that they conveyed it, and the water rights thereto appertaining, to the "Monitor Company." After that conveyance was made, Conly & Trainor obtained a judgment against the Monitor Company. The plaintiff introduced in evidence two deeds, the one executed by the sheriff to Conly & Trainor, purporting to be made in pursuance of a sale under execution issued upon the above-mentioned judgment; the other executed by Conly & Trainor to the plaintiff. The court found for the defendant, one of the findings being to the effect that Conly & Trainor acquired no right, title or interest in or to the waters of said Burg Creek under the sheriff's deed above referred to; and judgment was rendered upon the findings, that the plaintiff take nothing by his complaint.

The plaintiff can not maintain the action on the evidence in the record, unless it be sufficient to establish the fact that he acquired the title of the Monitor Company to the property in question. We are not apprised of the precise ground upon which the court found that the sheriff's deed did not convey the property to Conly & Trainor. But there is one fatal objection to the deed which may be mentioned, though not

noticed by counsel. The party relying on a sheriff's deed must produce not only the judgment and the sheriff's deed, but also the execution under which the property was sold. No execution was given in evidence.

But, passing this point, the description of the property in the sheriff's deed will be noticed. The deed purports to convey "all the estate, right, title and interest of the said Monitor Gold Mining and Lumber Manufacturing Company * * * in or to all the following land or claims, situated * * * generally known and designated as the 'Monitor claims,' bounded on the northwest by the Golden Age mining claims, and on the southeast by the Buckeye mining claims, together with all and singular the buildings, machinery, water ditches and privileges, together with the hereditaments and appurtenances thereunto belonging or in anywise appertaining." The Ohio Water Ditch and its appurtenant water rights are not described in terms in the deed, and are not included in the description above given, unless they are appurtenant to the "Monitor claims." The mere fact that the Monitor Company purchased the Ohio Water Ditch, and the water rights appurtenant thereto, would not constitute them appurtenances of the "Monitor claims."

It is alleged in the complaint that the ditch was constructed and used for the purpose of conveying water to Richmond Hill, and the Monitor Company might, after its purchase, have used it solely for the same purpose. It appears, from the evidence, that the Monitor Company used a portion of the waters of Burg Creek in working their claims, before the purchase of the ditch; but even if it used more of such waters after the purchase of the ditch, it does not necessarily follow that the ditch was used in the working of the claims, or by any means became appurtenant thereto. It is not proven that a larger portion of the waters was used in working those claims before than after the purchase of the ditch. The burden of proof was upon the plaintiff to show that the water rights in controversy were appurtenant to the "Monitor claims." This may be illustrated by supposing that an action had been brought by the purchasers at the sheriff's sale for the recovery of a parcel of machinery, claiming that the title passed to them by the deed above mentioned. It is manifest that they could not have

recovered, without proof that such parcel of machinery had been used in working the mining claims, and thus became appurtenant thereto. The plaintiff here has failed to prove that the Ohio Water Ditch, and the water thereto pertaining, became appurtenant to the "Monitor claims"; and therefore has failed to prove that the title thereto passed, by virtue of the sheriff's deed to Conly & Trainor.

Judgment and order affirmed. Remittitur forthwith.

1. Miners' houses treated as appurtenances: *Keystone Co.* v. *Gallagher*, 5 Colo. 23; *Post* LIEN.

2. The right to mine treated as carried by the word appurtenances: *Grubb* v. *Grubb*, 74 Pa. St. 25; *Post* INCORPOREAL HEREDIT.

3. Railroad held to pass under sheriff's sale of ironworks without use of the word "appurtenances": *Wright* v. *Chestnut Co.*, 45 Pa. St. 475; *Post* RAILROAD.

4. Easement in adjoining land not conveyed as appurtenant: *Grubb* v. *Guilford* 4 Watts, 223; *Post* EASEMENT.

5. A thing corporeal can not be appended to a thing corporeal: *Coleman's Appeal*, 62 Pa. St. 252; *Post* TENANT IN COMMON.

6. Ditch not appurtenant to ditch: *Donnell* v. *Humphreys*, 1 Mont. 518.

WILLIAMS v. SCHMIDT.

(54 Illinois, 205. Supreme Court, 1870.)

Action by part of the board. Where parties agree to settle certain differences between them by submission of the matters in dispute to four persons, two to be selected by each party, the action of two persons selected by one of the parties will not be regarded as an arbitration under such agreement, so as to be binding on the other party.

Notice to parties. But even where the body of arbitrators is organized according to the agreement of the parties, it is essential to the regularity and validity of their action that such notice be given the parties as will afford them an opportunity to be heard.

***Recoupment, when allowable between lessor and lessee.** In an action by a lessee against the lessor, it appeared the subject of the lease was a coal mine, and the lessor, under a provision in the lease, had resumed possession of the leased property before the end of the term for non-payment of rent, and because the mine was not being worked to his satisfaction. The lessee sued to recover for certain mining tools and other property belonging to him, which were taken by the lessor when he terminated the lease, and also for the erection of a blacksmith shop and other buildings: *Held*, that the defendant in the action, the lessor, could recoup in this suit such damages as he had sustained by reason of the mine having been unskillfully worked by the lessee, in violation of the covenants in the lease, it being regarded that the subject-matter of the plaintiff's claim arose out of the lease. Nor would this recoupment as against the plaintiff, who was the sole lessee, be affected by the fact that after taking the lease, the lessee had associated others with him in working the mine, as he was liable under his covenants for injury to the property, whether occasioned by himself or by those connected with him in the business.

Appeal from the Circuit Court of St. Clair County; the Hon. JOSEPH GILLESPIE, Judge, presiding.

The opinion states the case.

Mr. WILLIAM H. UNDERWOOD and Mr. L. H. HITE, for the appellant.

Messrs. KASE & WILDERMAN, for the appellee.

Mr. Justice WALKER delivered the opinion of the court.

* *Brigham* v. *Hawley*, *post* 59.

This was an action of assumpsit, brought by appellee, in the St. Clair Circuit Court, against appellant, to recover $1,200.00 claimed to be due to appellee. The declaration contained the common counts to which the general issue was filed, and notice that special matter would be given in evidence in which it was claimed that appellee owed appellant $3,000.00. Issue was joined. A trial was had by jury, resulting in a verdict in favor of appellee for $700.00, upon which a judgment was rendered.

It appears that appellee leased a coal mine from appellant in 1868, for the term of ten years. Appellee entered into possession and operated the mine for about four months, but failing to pay rent, and not working the mine to the satisfaction of appellant he declared appellee's lease at an end, and resumed possession in pursuance to a stipulation contained in the lease. Afterward, differences arose in regard to a settlement between the parties, appellant claiming that he was entitled to pay for rent of the mine, freights paid by him on coal shipped by appellee, for tools and implements for mining turned over with the mine, and to be returned by the terms of the lease, and a large sum for damages to the mine, caused by working it in an unskillful manner, and in permitting it to get out of repair. Appellee claimed pay for the tools and mining implements taken by appellant when he took possession of the mine under the forfeiture, and for some horses and mules employed in the mine; also, for the erection of a blacksmith's shop and other buildings. It appears that the parties agreed to arbitrate these differences, and that each should select two men, and the four thus selected should hear and determine the controversy.

Afterward appellee came to the mine with two men whom he had selected, and after getting permission they went into the same, and the two examined it and such articles of personal property as appellee pointed out to them, and fixed a value upon the same, and furnished appellee a list. And it is now contended by appellee that this was an arbitration, and that appellant is bound by the acts of the two men thus selected by appellee. On the other hand appellant insists that it was not an arbitration, and that he is not bound by their acts, as the arbitration was not regularly constituted, and that the men thus selected went outside of the agreement to arbi-

trate, and passed upon claims and fixed prices upon property not embraced in the submission.

From the evidence contained in this record we are unable to see that there was an arbitration. It appears that but two persons were selected, and they by appellee, when the evidence of appellant is, that it was agreed that there should be four, two selected by each party, and this evidence stands uncontradicted. If this is true, there can be no pretense that the body was constituted in the mode agreed upon by the parties, and to be binding it should have been in accordance with this agreement. But even if it was conceded that the body was regularly organized the whole subsequent proceeding seems to have been irregular. It nowhere appears that appellant was notified of the time or place where the arbitration would take place. No opportunity was afforded him to produce witnesses or to be heard in support of his claim. The whole proceeding seems to have been *ex parte* in the interest of appellee, and if so, it would be unjust to compel appellant to abide by the determination thus made, unless he afterward assented to or adopted the action of the persons claiming to act as arbitrators.

Even the persons claimed to have been arbitrators say they do not know whether the property which they valued belonged to appellee, but they appraised such as he pointed out to them, and this was in the absence of appellant. There is no evidence that it was owned by appellee, except the bill of sale from Edwards, and it was then in the possession of appellant.

From this view of the case, it is apparent that the first instruction given for appellee was wrong. By it the court informed the jury that if the jury believed there was an agreement to arbitrate the differences between the parties, and in pursuance to the agreement two men were selected, and they proceeded to value the property, and struck the difference between the parties, and appellant agreed to pay appellee the difference found to be due him after deducting freight paid and back rent, they should find according to the award of the arbitrators. We have seen the evidence fails to disclose that there was a valid and binding award, nor does the instruction require the jury to believe there was. The instruction requires the jury to hold appellant bound by the award, no

matter how made, if the men claimed to be arbitrators only acted and struck the balance, no matter when or in what manner, if appellant said he would pay after deducting rent and freights. This instruction was calculated to mislead, as it cut off all evidence offered by appellant to show that the arbitrators had exceeded their authority.

If it was designed to inform the jury that if appellant agreed to pay the balance struck after deducting his account, or particular items of the same, then the instruction should have been so framed and given. But the instruction, as given, is based upon the idea that there had been a binding award, and that it cut off all other claims.

Appellant next insists that the court below erred in instructing the jury that if the damage to the mine was done by Schmidt & Co., such damage could not be recouped in this action. This question must be controlled by the contract of the parties, as manifested in the lease. It, when examined, shows that it was executed by appellant to appellee, individually, and not to him and others, or to his firm. He alone is liable, under it, for damages growing out of the breach of its covenants. Under the rule adopted by this court, that damages growing out of the breach of the contract may be recouped against a recovery under the agreement, no reason is perceived why appellant may not recoup any damages he may have sustained by reason of a failure to perform his covenants contained in the lease. This suit grows out of the lease, and appellant may set up the damages he has sustained by reason of the breach of the terms of the lease by appellee, to prevent a recovery, either in whole or in part. The damages are claimed as growing out of the matter in litigation in this suit. They do not grow out of a separate and distinct agreement or transaction, which would prevent them from being recouped. After appellee rented the mine, it did not matter that he associated others with him to operate it, as he was liable for all damages growing out of his or their breach of the terms of the lease. In this view of the case, the second instruction given for appellee was erroneous, and should not have been given.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

1. Case of arbitration, under articles, between partners in coal mining: *Darst* v. *Collier*, 86 Ill. 96; *Willesford* v. *Watson*, L. R. 8 Ch. App 473.

2. Interest or misconduct of arbitrator: *Proctor* v. *Williamson*, 8 C. B. N. S. 386; *Lonsdale* v. *Littledale*, 2 Ves. jr. 451; *Arkwright* v. *Cantrell*, 7 Ad. & E. 565.

3. Clauses of arbitration as affecting jurisdiction of courts: *Horton* v. *Sayer*, 4 H. & N. 652, and notes; *Mexborough* v. *Bower*, 7 Beav. 127; *Post* BARRIERS.

WEIST ET AL. v. GRANT.

(71 Pennsylvania, 95. Supreme Court, 1872.)

Mines sold on report of assayer. C. and others agreed to sell to W. and M. certain silver mines in Colorado for $80,000, the sale to depend upon a satisfactory report from B., an assayer; the report to be subject to the approval of W. and M., and if not satisfactory to them the agreement to be void. The purchase was made, but the ore proved to be of much lower grade than had been represented. The jury found that there was no fraud upon the part of C. *Held*, that W. and M. did not buy upon the faith of representations of the vendors, but upon the report of a competent assayer, and that their mouths were therefore closed against allegations of misrepresentation.

Garnishment—Uncertain interest. W. was garnishee in a foreign attachment against H. *Held*, that it being a fair presumption from the facts that H. was equally interested with others in the contract, that there could be a recovery, without first proving his exact interest.

Error to the District Court of Philadelphia.

This was a *scire facias* by Fanny Grant against John Weist and Andrew W. Myers, garnishees of George Hickcox. The plaintiff recovered in the foreign attachment a judgment against Hickcox for $3,836.82.

On the trial of the *scire facias* the plaintiff gave in evidence an agreement, executed in Philadelphia between Dr. George Coryell, of Colorado, acting in his own right, as well as attorney in fact for George Hickcox and William M. Power, both of Colorado, of the one part, and John Weist and Andrew W. Myers, both of Philadelphia, of the other part. By the agreement it was contracted to sell to Weist and Myers, for the consideration of $80,000, certain land in Colorado Territory containing the Franklin and five other silver lodes, which were named in the agreement, with appurtenances specified; $10,000 to be paid within ninety days after a satisfactory report from Professor Bruckner, assayer, etc., and the remainder at subsequent times as set out in the agreement; the last payment, being $35,000, to be paid in one year after Bruckner's report, which was to be made as soon as practicable to "Weist and Myers, which report is to be subject to their ap-

proval, and if not satisfactory, or approved by them, then this agreement to be void and of no effect, otherwise to be and remain in full force, and to be consummated."

They gave in evidence also a report from Bruckner and two other assayers, giving a somewhat detailed description of the two lodes, but not expressing a decided opinion as to the value of the lodes. Weist, garnishee, was called by plaintiff, and testified that they had received the report in less than a year after the date of the agreement, and that they had paid between $30,000 and $40,000 of the purchase money. The plaintiffs then rested.

The garnishees called Weist, who testified that in the negotiation Coryell showed reports from different persons, which stated that the lodes contained about $140 of gold and silver per ton, and represented that the product would be greater than the reports; that in other respects the lodes were of great value. On cross-examination the witness said that he had been in the mining business for four or five years; that he had not seen the land before he purchased, but that Myers had.

The garnishees then gave in evidence the reports which had been exhibited by Coryell at the time of the negotiation, and also evidence that the ore from the lodes as ascertained by assays, would yield not more than between $40 and $50 per ton, and that in other respects the lodes were of inferior value.

The plaintiff read the answers of the garnishees to the interrogatories in the case; in these they said that they had paid $54,000 on the contract, and that there were still due $26,000; that no settlement had been made or account stated between the vendors; that their interest was undivided, and garnishees did not know the amount due to Hickcox, and claimed that by reason of the misrepresentations made by Coryell, the vendors had been overpaid; that Coryell and Hickcox had taken out large quantities of ore before the contract and knew what the yield would be; that by works erected since their purchase, it had been demonstrated that the ore would not reach $50 per ton.

The garnishees requested the court to charge:

1. That if the jury believe a misrepresentation of a material fact was made by George Hickcox, or his agent, of an occult quality of the mineral properties purchased by defendants, and

the said misrepresentation was the inducement to purchase, they must find for the defendant.

2. That if the jury find that the defendants were induced to purchase the mineral properties in question from George Hickcox, through an assertion of the vendor or his agent of a very material fact which turned out to be false, and as to which the vendees had no means of obtaining correct information, that the defendants are entitled in this action to a deduction from the price agreed to be paid, to the amount of the difference between the value of what they received, and what they thought they purchased.

3. That the plaintiff having shown that if any money is due from defendants as garnishees to George Hickcox, that it is due to said Hickcox and third parties jointly, and nothing appearing to show the state of the partnership accounts as between the partners, or the solvency of the partnership, so as to enable the jury to decide that any precise or certain sum is due the said Hickcox individually, this action must fail.

The court charged: "The material question in this case is whether the original vendors were guilty of fraud in the sale; and it is alleged on the part of the garnishees that the representations as to the extent and value of the ore were false. If they were false and the vendors knew it, it might be a defense, as for instance, if there was a representation that the ore was worth $150 per ton, and it was only worth $50 per ton. To constitute a defense on the ground of fraud, it must not only appear that the statements made were not true, but that the party who is charged with the fraud knew them to be false.

I do not know that Prof. Buckner's report should stand against the evidence that the ores were not worth so much according to the assay. If Prof. Buckner could be honestly deceived, the vendors might be, although it is difficult to believe they could have been deceived to that extent. The report is a circumstance in the case, but not conclusive. If the vendors intended to mislead, it is not an answer that another labored under an honest misapprehension on the same points.

The question in this case is for the jury. If the vendors falsely and knowingly deceived the defendants as to a material point, then your verdict should be for the defendant; but if the transaction was a fair one, and the defendants were not misled, then your verdict should be for the plaintiff.

I decline to charge as requested in the fourth point of the defendant's, and the other points are sufficiently answered in my charge."

The verdict was for the plaintiff for $4,086.21.

The garnishees took a writ of error, and in several specifications assigned the charge of the court for error.

B. F. FISHER and D. W. SELLERS, for plaintiffs in error.

J. M. PILE and T. J. ASHTON, for defendant in error.

AGNEW, J.

The verdict of the jury establishes that there was no intentional misrepresentation of the yield or richness of the silver mines sold by George Coryell on behalf of himself and Hickcox and Power, to Weist and Myers. This leaves but two questions in the case that require notice. they alleged that Coryell, before the sale, represented that the ore from those mines would yield from $133 to $145 per ton, and that Weist and Myers bought on the faith of this representation in Philadelphia, the mines being in Colorado Territory, and out of reach before closing the contract. By actual assay the ore is found to yield only about fifty dollars a ton; and the garnishees, Weist and Myers, therefore allege a failure of consideration, and claim a right to defend on the ground of a material false representation of the richness of the mines. But the case is not like *Fisher* v. *Worrall*, 5 W. & S. 478, and others of that class, in which the misrepresentation of an occult quantity of land is held to be a defense when the vendee buys on the faith of the representation and not on his own judgment. In this case by the very terms of the agreement, it appears that Weist and Myers did not buy on the faith of any representation, but provided for a prospect and examination of all the mines by a competent assayer named in the article, as to their availability, richness, duration and condition, and also if having the requisite machinery to reduce or work two or more tons of the ore; and whether he has machinery or not to so reduce the ore, to report to Weist and Myers; the report to be subject to their approval, and if not satisfactory nor approved by them, the agreement to be void. Weist and Myers, therefore, did not rely on the representations of the vendors, but took the most

available means to protect themselves against the hazard of a distant purchase. Professor Buckner, the assayer, made the examination and reported, and on the report, Weist and Myers confirmed the purchase, and paid a large part of the purchase money. Nothing short of collusion and fraud in the report of the assayer could afford any ground of defense, and this is taken away by the verdict, the question of actual fraud having been submitted to the jury upon the whole case and found against them. The vendees bargained for the report of a competent assayer before they should be bound by the contract. They have had it and acted upon it, and their mouths are now closed against an allegation of misrepresentation in the inception of the contract.

The other question is as to the proportionate interest of George Hickcox, one of the three vendees, in the purchase money. It is contended that without proof of his actual interest in the mines, no verdict could be rendered for a specific sum, as his interest was unknown and might be less than this sum. But there is no evidence that Coryell, Hickcox and Power were mere partners, subject to a settlement among themselves. The largest inferences to be drawn from the contract and the answers of the garnishees in evidence would be that they were joint tenants and sold as such. The answers admit an unpaid residue of purchase money of $26,000, while the verdict is for $4,086.21 only.

The fair presumption from the fact that, in the sale, Hickcox is equally as well as jointly bound for the covenants on part of the vendors, is, that his interest in the subject of the contract is equal; otherwise he would have restricted his liability to a minor proportion. There is nothing in the agreement or the answers to rebut this presumption. Though only a *prima facie*, and indeed a weak presumption, yet it is sufficient to stand until something is proved to overturn it. This rebutting evidence would naturally come from Hickcox, the defendant, and the garnishees themselves, and not producing it, they can not complain of the inference of equality of interest as drawn from their acts.

The judgment is therefore affirmed.

1. Assay of rock as proof of existence of vein: *Southern Co.* v. *Europa Co.*, 15 Nev. 384; *Post* LOCATION.

2. Sale of ore without assay: *Deep R. Co.* v. *Fox*, 4 Ired. Eq. 61, 1 M. R. 296.

SMALL v. FRANKLIN MINING COMPANY ET AL.

(99 Massachusetts, 277. Supreme Court, 1868.)

Payment in checks—Notice of dishonor. Plaintiff, being the payee of two checks, for $201.20 and $99.80 respectively, indorsed them to the treasurer of the defendant company in payment of an assessment of $225, representing them to be "all right," and received in return a receipt for his sixth assessment and $76 in money. The drawer of the larger check failed on the day of this transaction, although he was solvent when he gave it ten days before, and was supposed by plaintiff to be solvent at the time of the indorsement. The check was duly presented at the bank and payment refused, and a few days later defendants notified plaintiff of this fact and requested him to make the check good, which plaintiff refused to do. *Held*, that defendants would not be enjoined from collecting the assessment; *held*, also, that plaintiff was not entitled to such notice as must be given upon the dishonor of a bill of exchange; but at most to such reasonable notice as would save him from loss, and that the brief delay in giving him notice did not appear to have occasioned any damage.

Plaintiff filed his bill for an injunction to restrain defendants from selling forty-five shares of the capital stock of the defendant company, owned by plaintiff for an alleged non-payment of an assessment of $5 per share which plaintiff claimed to have paid. Defendant denied full payment.

The parties agreed "that the defendants were entitled to proceed to sell the shares unless the transactions of June 18, 1867, should be held to have the effect of a payment of said assessment." It appeared in evidence that plaintiff called at the office of the treasurer of the company on the afternoon of that day and presented to the clerk in charge, the treasurer being absent, two checks payable to the order of the plaintiff and by him indorsed, one of which was for $99.80, drawn by Hubbard Brothers & Co., and the other which bore date June 8, 1867, was for $201.20, drawn by John R. Williams. The clerk at first objected to taking the checks of outside parties,

but upon plaintiff's representation that it was all right, took the checks and in return gave plaintiff $76 in money and the following receipt: "Boston, June 18, 1867. Received of Charles F. Small, two hundred and twenty-five dollars, 6th assessment. Franklin Mining Co. Charles Emery, Treasurer, per William F. Ward." Williams was in good business standing on June 8th, but failed on June 18th, and payment on his check was refused at the bank upon which it was drawn. Plaintiff did not know of Williams' failure until June 20th, and was not notified of the dishonor of the check until several days later, when defendant requested him to make it good, which plaintiff declined to do.

H. C. HUTCHINS, for the plaintiff.

J. M. KEITH, for the defendant.

CHAPMAN, C. J.

The plaintiff contends that his assessment has been paid by the indorsement and delivery of the check of Williams to the defendant's clerk, and the subsequent conduct of the clerk in respect to it. The plaintiff had held the check for several days without presentment or inquiry, believing it to be good, and represented to the defendant's clerk that it was all right. It was presented for payment on the next day, and this presentment was seasonable. The drawer had failed, and his paper had gone to protest on the day when the plaintiff passed it to the defendant's clerk. It was not, therefore, all right, as he represented it to be; that is, it was not a check which would be paid on due presentment at the bank. It was a different thing in substance from what either party supposed it to be; as much so as the bill of a broken bank which is passed and received as current.

The plaintiff was not entitled to such notice as must be given upon the dishonor of a bill of exchange. He was at most entitled to such reasonable notice as would save him from loss. It does not appear that the delay to give him notice, which was of a few days only, occasioned any damage to him, or that the value of the check was lessened.

There is no reason why the defendants should be enjoined

from the collection of their assessment. Bill dismissed with costs.

I. Statute of California construed: *Brundage* v. *Adams*, 41 Cal. 619; *Post* PARTNER.

2. Personal liability of stockholders: *In re South Mountain Co.*, 5 Fed. R. 403; *Post* STOCK; *Carson* v. *Arctic Co.*, 5 Mich. 288; *Merrimac Co.* v. *Bagley*, 14 Id. 505; *Post* STOCK; *Merrimac Co.* v. *Levy*, 54 Pa. St. 227; *Post* STOCK.

3. Relative rights of the assessable and non-assessable shares of stock, upon final distribution: *North A. Co.* v. *Clarke*, 40 Pa. St. 432.

4. The obligation of a stockholder to pay assessments, is an implied contract: *Woodwell* v. *Bluff Co.*, 25 Pa. St. 365.

5. Payments to creditors treated as payments on stock: *Carr* v. *LeFevre*, 27 Pa. St. 413; *Post* CORPORATION.

IN RE THE MEXICAN AND SOUTH AMERICAN COMPANY. GRISEWOOD AND SMITH'S CASE. DE PASS'S CASE.

(4 De Gex & J. 544. High Court of Chancery, 1859.)

Contributories liable for previous debts. Shareholders in a trading company are liable to contribute on the winding-up for debts incurred previous to, as well as for debts incurred after their purchase.

Contributories—Executory contract. Parties (Grisewood and Smith) held by a binding contract for the purchase of shares at the date of the winding-up order, such executory contract being, further, afterward completed, are liable as contributories.

Fellow shareholders not liable for directors' fraud. Where shares, though fraudulently issued by the directors, are purchased in open market, the purchasers, whatever their rights as against the directors, have no claim to relief against other shareholders.

Private company performing corporate acts. Neither trading as a company, nor the issue of shares transferable to *bearer*, make the company illegal on the ground of usurpation of corporate franchises.

Assignment to escape contribution. De Pass held 250 shares in the company which had cost him £1,750. About sixteen days before the winding up order he had transferred them to his clerk for £1. It was not disputed that he made the transfer to escape liability, but the evidence satisfied the court that the transfer was absolute, and it was *held*, that though the transaction was one requiring the most searching investigation, yet if made without any trust or reservation it should be upheld, and De Pass was discharged as a contributory, but without costs.

The first of these cases, that of Messrs. Grisewood and Smith, was an appeal from an order of the Master of the Rolls, dated the 7th of May, 1859, by which the appellants were placed or retained on the list of contributories of the company as the holders of 405 shares, and it was asked by the notice of appeal motion, not only that the order of the 7th of May, 1859, might be discharged, and the names of the appellants removed from the list of contributories, but also that, if necessary, the order for winding up the company, dated the 24th of November, 1857, and an order for a call of £9 per share, dated the 27th of April, 1859, might likewise be discharged. The other case, that of the Messrs. De Pass, was an appeal from orders of the Master of the Rolls, dated the 18th of April and the 4th of May, 1859, by which those appellants were placed or retained on the list

of contributories as the holders of 250 shares in the company. These appeals were heard separately, but judgment was delivered in both cases at the same time.

The company was formed in the month of April, 1835. It was formed in the first instance with the view of making advances of money to the owners of mines in Mexico, and receiving the produce of the mines at fixed rates, yielding a good return for the advances, but it was afterward extended to mining operations. Upon the formation of the company certificates were issued to the subscribers, which were in the following form:

"The holder of this certificate having paid £ —— [1*l* per share] to the directors of the Mexican and South American Company will be entitled to —— shares on his making the following payments, etc.," such further payments being those mentioned in the prospectus, a copy of which was printed upon the certificates. This prospectus was the only instrument defining the constitution of the company, no deed of settlement ever having been executed.

The prospectus, after stating the objects of the company, proceeded as follows:

"For the foregoing purposes it is proposed to raise a capital of 100,000*l*, in 10,000 shares of 10*l* each; of this sum 5*l* per share is to be paid at the following periods, namely, £1 per share on subscribing;

£1 ditto on the 1st of September, 1835;
£1 ditto on the 1st of December, 1835;
£1 ditto on the 1st of February, 1836; and
£1 ditto on the 1st of April, 1836.

The remainder of the capital to be called for when required by the directors, in sums not exceeding £1 per share at each call, and at an interval of not less than two months between each call; thirty days' notice of each call to be given in the London Gazette and three daily morning and evening papers.

If any call be not paid within thirteen days of the same becoming due, the directors shall, at the first convenient opportunity, sell the shares so in default, and hold the proceeds thereof, after deducting the amount of the call and interest thereon at £5 per cent. per annum, at the disposal of the proprietors thereof. As the principle on which the company is

formed is that of putting its capital speedily into active operation, and as one engagement has already been made for this purpose, it is proposed that the dividend at the rate of £6 per cent. per annum on the subscribed capital shall be at once fixed, and that the directors shall make such additions from time to time thereto in the shape of bonus as the state of the company may authorize, the first dividend to be paid on the first of January, 1837. In the event of the operations of the company admitting of the advantageous employment of a larger amount of capital, the directors shall have the power to create 10,000 additional shares of £10 each, the same to be issued preferably to the holders of the existing shares; and in the event of its appearing expedient still further to increase the capital, a further creation of shares may take place with the consent of the majority of the shareholders at a general meeting to be called for that purpose, the same being in all cases to be issued preferably to the holders of existing shares. The affairs of the company to be managed by the board of directors; the directors remain in office until the second Wednesday in May, 1840, when, and at the same period annually, one director shall go out of office. Vacancies in the direction previous to the second Wednesday in May, 1840, shall be filled up by the directors; after that period they shall be filled up by the proprietors at the general annual meeting, or at a general meeting to be called specially for that purpose. A director retiring to be immediately re-eligible. The auditors shall be elected annually at the general meeting of the proprietors.

Fifty shares shall be the qualification of a director, and forty shares the qualification of an auditor. A general meeting of the proprietors shall be held on the second Wednesday in May in each year, when the state of the company's affairs will be laid before them. Certificates will be issued for the shares; a proprietor of twenty-five shares to have one vote, etc. It is proposed that on the payment of each dividend a sum equal to £10 per cent. of the amount thereof shall be appropriated to form a reserve fund, and that if at any time the shares of the company should be below par, the directors shall have authority, if they shall see fit, to apply the amount of the reserve fund to the purchase of such shares for the account of the company; such shares, if afterward disposed of, to be sold by public tender for the account of the company."

The prospectus, it will be observed, stated nothing as to the mode of transferring shares. In 1852 the directors issued other certificates in the following form: "The holder of this certificate is entitled to —— shares of £10 each in the Mexican and South American Company, on which £9 per share has been paid." The shares were throughout treated as being as they appeared by the certificates to be, transferable by delivery. At different times after the formation of the company further shares were issued under the powers given by the prospectus, and certificates were issued for these shares varying somewhat in form from the first certificates, but still purporting that the holders were entitled to the shares.

On the 24th of November, 1857, an order was made for the winding up the company.

Messrs. Grisewood and Smith, the appellants in the first case, were share dealers, and the course of their business was to buy and sell shares on their own account and for their own profit. On the 18th of November, 1857, they bought 80 shares, and on the 23d of November, 1857, they bought 325 more shares in this company, making together the 405 shares to which this appeal motion applied. The certificates for 300 of these shares were handed over to them before the 24th of November, 1857, and were in their hands on that day. Some time after that day they received the certificates of the remaining 105 shares.

Messrs. De Pass had been, for about eighteen months before November, 1857, the holders of 250 shares, for which they had paid £1,750. They had paid calls on these shares, and one of the members of the firm had been an auditor of the company. On the 8th of November, 1857, Mr. Benjamin De Pass handed over these certificates to Mr. Spencer, a clerk in the employment of the firm, who gave him £1 for them.

The evidence both of Mr. Benjamin De Pass and of Mr. Spencer was to the following effect: That Mr. De Pass, without any previous communication with Mr. Spencer, handed the certificates over to him, saying that he should have them for a sovereign, and that Mr. Spencer at once accepted them and paid that sum. Nothing further passed between them on the subject, and it was positively deposed to by Mr. De Pass that there was no understanding between him and Spencer that the firm should retain any interest in the shares, nor any

understanding that Spencer should be indemnified against his liabilities in respect of them. It appeared plainly that the Messrs. De Pass had at the time good reason to believe that the company was in difficulties. Spencer retained the shares about three weeks and then sold them to a Mr. Joseph, a traveler of the Messrs. De Pass; £1 was considerably below the market value of the shares at the time of this transaction, and the shares above mentioned to have been bought by Messrs. Grisewood and Smith on the 18th and 23d of the same month were bought by them at the average price of about 7½*d* per share.

After the transfer to Spencer, notices and circulars continued to be sent by the secretary to the Messrs. De Pass, who neither replied to them nor forwarded them to Spencer, but destroyed them. The Master of the Rolls under these circumstances held that the transfer to Spencer was not *bona fide*, and that Messrs. De Pass must be on the list of contributories.

Mr. SELWYN, Mr. WALEY and Mr. HORACE LLOYD, for Messrs. Grisewood and Smith.

This was a bubble company, illegal at common law, and there can not be any right to call on us for contribution. We may raise this contention without challenging the order for winding up; it may be good as to the original shareholders, and yet not good as to us: *Barclay's Case*, 26 Beav. 177. The company assumed to act as a corporation by making its shares transferable at the will of the holder, and thus was illegal: *Vice* v. *Lady Anson*, 7 B. & C. 409; *Ex parte Finlay*, 26 Beav. 182, and the cases cited in *Aston's Case*, 4 De Gex & J. 320. The issue of the new shares, moreover, was a fraud for the benefit of the old shareholders, the company being at that time known to the directors to be insolvent. Also we never became shareholders. There is no case in which a person has been held liable where he has signed no document. It is the general understanding of the commercial world that a person who merely takes scrip incurs no liability until he does some act to make himself a shareholder. That understanding is not of itself decisive, but the cases tend to show its correctness. By the terms of the scrip certificates the bearer is to become

a shareholder on doing certain things, none of which have been done; nor have we ever received a dividend; the persons who last received dividends on these shares ought to be contributors in respect of them, not we. From the observations of Lord Cranworth in *Mayhew's Case*, 5 De G., M. & G. 837, it appears that merely taking scrip will not make a person a shareholder. If we are contributories at all, it ought to be with a qualification, such as in *Sanderson's Case*, 3 De G. & Sm. 66, that we are only liable to debts contracted *after* we took our shares. This is the general rule as to partners, and there was no power here to create shares having incidents differing from those of shares in an ordinary partnership; we are therefore not liable to the old debts, for there is nothing from which a contract can be inferred to become liable to antecedent debts. It will be urged that this is inconvenient, but that argument has not much weight; the persons who contracted are liable to the creditors, and if this court finds insuperable difficulty in working out the rights of the parties they must be left as they are: *Clough* v. *Ratcliffe*, 1 De G. & Sm. 164, 176. Even if the company was not illegal at common law, it was so under 19 & 20 Vict. c. 47, § 4, until that section was repealed by 20 & 21 Vict., c. 14, § 3, and the debts contracted during that period being illegal, there can not be any right of contribution in respect of them. The order for the call is therefore invalid. We were induced to take shares by false representations, especially by the payment of large dividends when there were not any profits out of which they could be paid, and we come within *Brockwell's Case*, 4 Drew, 205, and the observations of Lord Justice Turner in *Nicoll's Case*, 3 De G. & J. 387. As to the 105 shares which were not delivered till after the winding up order, we at all events ought not to be contributories, for the equities should be treated as fixed at that date.

Mr. ROUNDELL PALMER and Mr. ROXBURGH, for the official manager.

No reason has been shown for disturbing the call beyond the argument, that the debts incurred during the year which followed the passing of 19 & 20 Vict., c. 47, ought to be disallowed. But the debts stand allowed, having been ascer-

tained in Chambers, and this is not the way of reviewing their allowance. Moreover the 19 & 20 Vict., c. 47, never had such an effect as that contended for; it merely imposed certain liabilities on companies which did not register under that act, and did not make their trading illegal.

Even if this be not so, the 4th clause was repealed in the following session, and so, as to incomplete transactions, became as if it had never existed. As to the winding up order the time for appeal is passed: *Re Chepstow, Gloucester and Forest of Dean Railway Company*, 2 Sim. N. S. 11; and moreover, the order has been enrolled. Then, as to the liability of these appellants to be on the list. It is said that this was a bubble company, but there is no pretense for that; it was a *bona fide* company with large assets. There is no authority for the proposition that creating transferable stock is illegal at common law, or even under the statute 6 Geo. 4, c. 91 (the Bubble Act); *Rex* v. *Webb*, 14 East, 406, and in *Duvergier* v. *Fellowes*, 5 Bing. 248, it was held that the repeal of the Bubble Act left bubble companies to common law, and that under it a company which was really a bubble company, as the one in that case was, was illegal. Lord Langdale appears to have thought, in *Jackson* v. *Cocker*, 4 Beav. 59, that dealings in scrip were illegal; but that is shown to be groundless by *Young* v. *Smith*, 15 M. & W. 121. In *Blundell* v. *Windsor*, 8 Sim. 601, the plaintiff introduced allegations into his bill, which showed the company to be illegal; but in *Harrison* v. *Heathorn* 6 M. & G. 81, the same company was held legal. The certificates in this case do not contain any representations bringing the company within the Bubble Act. *Sheppard* v. *Oxenford*, 1 K. & J. 491. The only representation as to transfer which makes a company guilty of assuming to act as a corporation, is a representation that shares can be transferred so as to exempt the transferor from all liability to creditors for debts incurred before the transfer. There was no fraud in the issue of the new shares; the directors were misled by the reports of their agents in America. As to the transferees having done no acts to make themselves shareholders, that is disposed of by *Yelland's Case*, 5 De G. & Sm. 395, and *Cookney's Case*, 3 De G. & J. 170. The appellants came into the concern as a going concern,

and took the shares subject to existing debts: *Cape's Executor's Case*, 2 De G. M. & G. 562.

Mr. SOUTHGATE, for the creditors' representative.

In *Sanderson's Case*, 3 De G. & Sm. 66, the decision was put on the ground that the court had nothing to do with liability to creditors, but only with liability of the shareholders *inter se;* but now the creditors are parties to the proceeding, and are before the court. That case is in our favor as to the effect of an agreement to take shares which has not been completed, and so disposes of the point as to the 105 shares.

Mr. WALEY, in reply.

Judgment reversed.

Mr. SELWYN and Mr. HOBHOUSE, in support of the appeal of Messrs. De Pass.

The Messrs. De Pass parted with their shares *bona fide* before the winding up order. It was a complete legal transfer; there was no reservation for the benefit of the transferor and no agreement to indemnify the transferee. The case is analogous to that of leaseholds; an assignee of which may assign to a pauper in order to avoid his liability for the rent and covenants, and there is no equity to restrain him from doing so. *Onslow* v. *Corrie*, 2 Madd. 330; *Rowley* v. *Adams*, 4 My. & Cr. 534; *Valliant* v. *Dodemede*, 2 Atk. 546, *Jessop's Case*, 2 De G. & J. 638, substantially govern the present.

Mr. ROUNDELL PALMER and Mr. ROXBURGH, for the official manager.

This was not a *bona fide* transfer, such as to release Messrs. De Pass from their liability. There is no analogy between this case and that of a transfer by an assignee of leaseholds; there is no priority between the landlord and the assignee; but this is a case of partnership, and the partnership contract which creates a privity between the partners makes *bona fides* necessary in all dealings by which they affect each other. *Blissett* v. *Daniel*, 10 Hare, 493, 522. The question is, whether there was a real and *bona fide* transfer with intent to

substitute a person who meant to go on with the company. It is plain that there was not; there was no negotiation; the clerk was merely passive; it was a mere device by Mr. De Pass to get rid of his liability.

[Mr. SELWYN.—An assignee of a share in a partnership may assign to an insolvent: *Jefferys* v. *Smith*, 3 Russ. 158.]

Lund's Case, 27 Beav. 465, is precisely in point.

Mr. SOUTHGATE, for the creditors' representative.

Mr. SELWYN, in reply: I admit that this transfer was made in order to escape from liability, and I contend that Mr. De Pass was entitled to make it for that purpose. His liability arose by a delivery of shares to him; he never received a dividend; never was in communication with the company; there was nothing to create an equity restraining him from parting with his shares. There is no suggestion in evidence that Spencer is insolvent. The time of transfer and the situation of the company are not material. In *Lund's Case*, the transferor had acted as a shareholder and admitted himself liable, which distinguishes that case, if such a distinction be needed, for I submit that all that is required is, that there should be an out and out parting with the shares to a person not filling any fiduciary position with regard to the company. Mr. De Pass is merely a former shareholder, and ought not to be on the list: *Sutton's Case*, 3 De G. & Sm. 262.

Judgment reversed.

The Lord Justice TURNER, after stating the history of the company to the same effect as above, and the facts relating to the acquisition of shares by Messrs. Grisewood and Smith, proceeded as follows:

The question is, whether Messrs. Grisewood and Smith ought to have been put upon the list of contributories as to all or any of these 405 shares. Now, at the date of the winding up order, Messrs. Grisewood and Smith were both the legal and equitable owners of 300, and were the equitable owners of the remaining 105 of the shares, and *prima facie* therefore there can be no doubt that it was proper to put them upon the list. Apart from the special ground to which I shall presently advert, nothing was said in the course of the argument, and nothing has on further consideration oc-

curred to my mind, which can in any way exempt them from being liable as contributories. It was said, indeed, on their behalf, that there could be no debts of the company contracted after the 18th of September, 1857, and none therefore to which they could be liable to contribute, and that no express contract was shown, and no contract on their part could be implied to indemnify the parties from whom they had purchased these shares; but it seems to me to follow, from the very nature of the shares, that these parties must be held to have purchased them subject to the existing debts. The shares were purchased by them as shares in a continuing concern, and, in the absence of an express contract to that effect, it can not, I think, be supposed that either the vendors of the shares or these parties, as the purchasers of them, could have intended that the accounts of the concern were to be taken down to the time of the purchase, and the proportion of the then existing debts, attributable to the shares, be paid by the vendors. It was also said, on the part of these appellants, that as to the 105 shares the contract had not been completed at the date of the winding up order; but it was not attempted to be denied that there was at that time a valid and binding contract for the purchase of these shares. That contract was indeed afterward completed; and it is settled by the authorities that in such cases the purchasers of the shares are to be put upon the list. Apart, therefore, from any special grounds, I think that these appellants were properly put upon the list as to the whole of the 405 shares.

It was said, however, on the part of these appellants, that this company was illegal, and the argument on that point was urged both with reference to the liability of the appellants and to the validity of the winding up order; and it was also said on their behalf that the shares of which they are the holders were fraudulently issued by the directors. These shares, however, appear to have been bought by the appellants in open market; and whatever their rights and remedies may be as against the directors in respect of the alleged fraud, it does not seem to me that they have made out any case which can entitle them to relief upon this ground as against the

other shareholders. *Nicoll's Case* is not without its bearing upon this point.

Then, as to the alleged illegality of the company. This is, in truth, no more than an association of a large number of persons for the carrying on mining operations, or operations connected with mining, in foreign countries, and no public mischief is shown to have been contemplated in the formation of the company or to have resulted from it. It was said that the persons associated assumed to act as a corporation; that they traded as a company, and that the shares were transferable; but the mere trading as a company is not assuming to act as a corporation, or, as I apprehend, is the circumstance of shares being transferable anything more than evidence leading to the presumption of the corporate character having been assumed, and here any presumption which might have been drawn from the shares being transferable, seems to me to be completely regulated by the facts of the case; for, by the prospectus defining the constitution of the company, everything is left to the management of individual directors, and all the proceedings of the company appear to have been carried on by the directors in their individual character. I think, therefore, that neither the case of illegality nor the case of fraud can be maintained. What fell from the Court of Common Pleas in the case of *Harrison* v. *Heathorn*, 6 M. & G. 81, seems to me to have an important bearing on this question of illegality, although the case itself may well be distinguished from the present.

Another point was raised on the part of these appellants with reference to the order for the call. It was said that by the 4th section of 19 & 20 Vict., c. 47, the trading company was illegal from the 3d of November, 1856, to the 14th of July, 1857, when the section referred to was repealed by the 20 & 21 Vict., c. 14, § 3, and that the debts contracted during this period were not the debts of the company, but debts of the individuals who were at the time the shareholders in the company. I think, however, that this point is also untenable, for I apprehend that where an act of Parliament, or part of an act of Parliament, is repealed, it must, as was laid down by Lord Tenterden in *Surtees* v. *Ellison*, 9 B. & C. 750, be

considered as if it never had existed except as to transactions which are past and closed, and it can not be said that the transactions in this case were passed and closed whilst the debts remained unpaid. I am of opinion, therefore, that the appeal of Messrs. Grisewood and Smith wholly fails, and that their motion must be refused, and with costs.

Then, as to the case of the Messrs. De Pass. They are put upon the list for 250 shares which were formerly held by them, and for which they had paid £1,750.

Their case is, that on the 8th of November, 1857, sixteen days before the date of the winding up order, they delivered over these shares to Mr. Spencer, one of their clerks, in consideration of the sum of £1 paid by him to them. It sufficiently appears, I think, from the evidence, that at this time they were aware, or at all events had good reason to suspect, that the company was in difficulties. It was, indeed, admitted in the reply that their object was to get rid of their liability, and it was insisted that they were entitled to do so. I agree that they were, for I can not see what equity there could be on the part of the other shareholders to insist upon their retaining the shares. The question, therefore, as to these appellants, seems to be, whether they did or did not on the 8th of November, 1857, *bona fide* part with these shares out and out. I had much doubt upon this point when the case was argued, more especially from the fact that even at a later date the shares appear to have been sold in the market at a price which would have yielded more than was paid for them to the appellants by their clerk, but I have since read and considered the evidence more carefully, and I am satisfied that we can come to no other conclusion upon it than that these shares were, on the 8th of November, 1857, absolutely and *bona fide* parted with by the appellants out and out, without any trust for their benefit, or any reservation whatever; and I am of opinion, therefore, that this order must be discharged, and the names of these gentlemen removed from the list. I think, however, that the transaction was one requiring the most searching investigation, and that there should be no costs to the appellants of any part of the proceedings.

The Lord Justice Knight BRUCE.—I am also of opinion

that the appeal of Messrs. Grisewood and Smith fails, and that the appeal of Messrs. De Pass does not. I agree also as to costs.

1. Assignment by licensee: *Dark* v. *Johnston*, 55 Pa. St. 164; *Post* LICENSE.

2. Assignment of right of action: *More* v. *Massini*, 32 Cal. 590; *Post* INJUNCTION; *Kimball* v. *Gearhart*, 12 Cal. 28; 1 M. R. 615; *McGoon* v. *Anbeny*, 11 Ill. 558; 1 M. R. 9. See STOCK.

3. Notice of defense to assignee: *Bronson* v. *Silverman*, 77 Pa. St. 94.

COOK, AD SECTAM, LINN.

(19 New Jersey L. 11. Supreme Court, 1842.)

Money paid. If a plaintiff has, at the request of defendant, discharged a sum of money or debt due from the defendant to any other person, by applying his own moneys, goods, chattels, securities or lands to such discharge, he may recover the amount so paid or satisfied, in an action of general *indebitatus* assumpsit for money paid, etc., but the plaintiff can not, upon such a count, recover more money than he actually paid, whether the payment was made in money or in anything else.

Special agreement must be declared on—"Ore tickets" as evidence. If a plaintiff has expended money for the defendant, under a special agreement, in a particular way or for a specific object, to be repaid at a given day, he may, after he has performed his part of the contract, and after the expiration of the time, recover the money so expended, in an action for money paid; but he can not, in such action, recover any advance or premium on his outlays, or any compensation for his risk or trouble, although by the terms of the special agreement the defendant was to make him such allowances. If the plaintiff goes for such additional compensation, he must declare upon and prove his special agreement. If the plaintiff, at the defendant's request, has taken up and paid off certain outstanding evidences of debts due from the defendant to other persons, not of a negotiable nature, called "ore tickets," the mere production in court at the trial, of such writings, is not sufficient evidence that he has paid off and satisfied such debts, nor that he had done so before the action was brought; nor will such writings alone support an action for money paid, etc.

In assumpsit. Rule to show cause why the verdict which had been rendered for plaintiff should not be set aside.

I. H. WILLIAMSON, for defendant, in support of the rule.

P. D. VROOM, *contra.*

The following statement of the case was prefixed to the opinion of Justice NEVINS.

The declaration charges that the defendant, on the 6th day of December, 1837, and before and after, conducted certain iron works called the "Clinton Furnace," and employed persons and teams to transport ore to said works, and for each load so carted he gave the carter thereof a receipt acknowl-

edging that he had received the quantity expressed in such receipt and the price due for carting the same, which receipts were called "ore tickets." That afterward and on the day aforesaid, in consideration that the plaintiff would take up, purchase and receive such of said tickets as had been or should be given by the defendant after the first day of the same month, of the persons so employed in carting, that he, the defendant, would receive said tickets, and pay to the plaintiff the amount due thereon, without deduction, at thirty days from the respective dates thereof. It then avers that relying, etc., he, the said plaintiff, did take up and pay off the sums due on one hundred and fifty of said tickets given after the 1st of December, amounting, in the whole, to three hundred and fifty dollars, of which the defendant had notice.

The second count is a general *indebitatus* for goods sold, money paid, etc., to all which the defendant pleaded the general issue.

In a bill of particulars furnished by the plaintiff, a copy of one of these receipts or tickets is given and is in the following form: "December 5, 1837, No. 512. Received per Thomas Perry's team from the ore bed, 20 1-4 cwt. ore, at 3 50-100 dollars per ton." Cwt. 20. 1.00 is $3.54; (signed) "H. W. Cook."

The others are alleged to be in like form, and in the bill are referred to by their numbers. The amounts and dates of said tickets are also furnished in said bill, with charges for money lent and paid to said defendant and his servants at his request, with some other matters not necessary to be noticed here.

Upon the trial at the Sussex Circuit, several bills of exception were tendered by the defendant and sealed by the court. These present a mass of testimony too voluminous to be here stated in detail, and not necessary for the decision of the question involved in the case. I will only advert to such parts as are connected with the questions agitated at the trial, and discussed on the argument of the present motion.

The plaintiff proved that in August, 1837, the defendant assumed the management of the Clinton Furnace, which had before been conducted by "The Clinton Manufacturing Company," in the county of Passaic, and that he continued there until about the first of January, 1838. That he undertook to

put the furnace in blast in September, and attended to getting coal and ore for the works. That the tickets were signed and issued by the persons employed in weighing the ore. That the credit of the company was low, and the defendant told the carters he would see them paid, and that the blast was to pay the debts contracted in carrying it on. That the iron made was sent away in the name of the defendant, and that he received the proceeds or part of the proceeds. The books continued to be kept in the name of the company, but the blast was carried on upon the credit of the defendant, who said he had made an arrangement with the plaintiff to take the "ore tickets," and that he was to pay them in a certain time, thirty or sixty days.

After the foregoing evidence, the plaintiff offered in evidence the tickets, which were objected to by the defendant, but permitted by the court to be read.

A motion to nonsuit having been overruled, the defendant proved that he left the furnace about the 1st of January, 1838, in consequence of an injunction having been obtained against the company. That about this time the plaintiff sent his son to the works with about $150 worth of tickets to be redeemed, who was informed that the contract in relation to the redemption of the tickets could not be complied with in consequence of the injunction; that the works were going on differently under other managers, and that the defendant had left there altogether. That the plaintiff's son at the same time brought a letter from him, which the witness had not since been able to find though he had searched for it. The witness further stated that he did not consider the letter worth much and did not preserve it; the plaintiff's son might have taken it back.

The defendant then offered to show the contents of that letter, which offer was overruled. He then offered in evidence the books of account of the company, which were in like manner rejected.

He then proved that all the money received by him for iron had been paid out by him for debts contracted in carrying on that blast, and gave in evidence a receipt from the plaintiff to the company for fifty dollars. Also that the plaintiff had presented this account to the receivers appointed

by the chancellor under the injunction against said company.

He then offered to prove that the plaintiff had purchased and paid for the tickets with store goods and not for cash, and that he charged more for his goods in such exchange than when he sold for cash. This evidence was also rejected.

It was further proved on the part of the defendant, that the ore carted after the 1st of January, was upon the credit of the company; and on the part of the plaintiff, that he held other tickets of the company and their due bill, upon which he had credited the company the fifty dollars above mentioned.

Upon this evidence, which is all that is material to be here stated, the court charged:

First. That the plaintiff's proof did not support the special agreement in his declaration, but if he took up these tickets at the defendant's request and on his promise to pay them in thirty or sixty days, he was entitled to recover on the general count for money paid.

Second. That he need not prove that he paid for the tickets in cash, but payment in goods or even in his own note, if accepted in payment, was sufficient.

Third. That possession of the tickets was evidence of his having paid for them.

Fourth. That if these tickets are for the ore carted on the defendant's credit, during his "*blast*" and are the same which he undertook to pay, and promised the plaintiff to take up, it matters not by whom they were signed; and he left this to the jury to determine.

Fifth. That the plaintiff had no claim for any tickets taken by him after notice that the defendant had left the furnace.

Sixth. That if the jury believe the fifty dollars paid to the plaintiff was the money of the company and paid on their own separate account they ought not to allow to the defendant any credit for it.

Upon this evidence and charge of the court, the jury rendered a verdict for plaintiff for $233.68.

HORNBLOWER, C. J.

This action was brought to recover money paid upon a number of tickets, or receipts for iron ore, usually called "Ore tick-

ets," which had been issued by the defendant or by his clerks or agents, for that purpose. These tickets were numbered and each showed upon its face the quantity of ore received; of whom, and when received, and the amount due thereon; but contained no promise of payment by or to any person. They were mere evidences that so much ore had been delivered by the person named therein, at the Clinton furnace, on the day mentioned in each ticket. Several reasons were assigned and pressed upon the argument as sufficient ground for granting a new trial; none of which in my opinion can prevail, except that founded on the misdirection of the court.

The first count in the declaration sets forth a special agreement, by which, "in consideration that the plaintiff would take up, purchase and receive such receipts or ore tickets, as had been and should be given by the defendant after the first day of December, 1837, of the carters, etc., that the defendant would receive the said receipts or tickets of the plaintiff and pay him the amount due thereon, without any deduction, at thirty days, to-wit: at thirty days from the dates thereof respectively."

The second count was for goods, etc., sold and delivered; money paid; money had and received, and money lent, etc.

It is abundantly manifest from the evidence in the cause, as reported to us, that for all the tickets issued during the month of December, 1837, the defendant was personally liable for the moneys due thereon, to the persons named in them; but they were not assignable; or rather not negotiable, and consequently no persons except those to whom they had been given, could use them as evidences of debt due to them from the defendant. Nevertheless, if the plaintiff "purchased and took up" any of the tickets in pursuance of such special agreement as was set forth in the declaration, the defendant thereby became liable to pay him the full amount of those tickets, according to the terms of that agreement, without any regard to the question of how much the plaintiff paid for them. If, however, there was no such special agreement, and the plaintiff paid for and took up the tickets at the defendant's request, then the plaintiff can only recover upon the general count, the money or value actually paid by him for the tickets.

But it is not pretended that there was any evidence on the

trial, of such special agreement as is set out in the declaration. The evidence on this part of the case, proves at most, a request by the defendant, that the plaintiff would take up the ore tickets, and a promise by defendant to repay him in sixty or thirty days.

The plaintiff produced at the trial between sixty and seventy ore tickets, issued by the defendant or his agents, amounting in the aggregate to about two hundred dollars; but he gave no evidence (except as to a few of them) how he came by them; nor whether he had given anything for them either in money or goods; nor did he give any evidence to show that he owned all the tickets when he brought this action.

Upon these facts, the judge in charging the jury stated, that as the plaintiff's proofs did not correspond with the special agreement in the declaration, he could not recover on the first count; "but if upon his part, he had performed a special agreement, by taking up tickets for the defendant, to be paid the amount of them in sixty or ninety days," the plaintiff was entitled to recover on the general count for money paid, etc. And again, the judge told the jury, "that if the plaintiff (being a storekeeper) gave store goods, or even his note, and the holder accepted such goods or notes in payment, it was equivalent in law to taking them up with money." And again "that if the plaintiff had the tickets in possession, ready to be delivered up to the defendant, it was a sufficient evidence of payment."

As to so much of the charge as relates to the manner of paying for the tickets, I am inclined to think it was correct. The cases are not reconcilable on this point; some requiring an actual payment of money in order to sustain a count for money paid; others holding that a promissory note, or other negotiable paper, given by the plaintiff and accepted by the creditor in satisfaction of the debt, is sufficient; others, again, sustaining the action where a bond has been given, or land conveyed, by the plaintiff in satisfaction and extinguishment of the debt. But after examining the cases (most of which will be found collected or referred to in *Hoyt* v. *Hoyt*, 1 Harr. R. 138, 146, and in Anthon's Nisi Prius, 132, in note), I am of opinion, upon principle, that wherever the plaintiff has, at the defendant's request, discharged a sum of money or debts

due from the defendant to any other person, by applying his own money, goods, chattels, securities or lands to such discharge, he may recover the amount so paid or satisfied, in an action of general *indebitatus* assumpsit, for money paid, etc.

If, however, by the first part of the charge, the judge meant to say, that upon a count for money paid, laid out and expended, to and for the use of defendant, the plaintiff might recover more money than he had actually paid, laid out and expended, or more than the note, or value of the goods he had appropriated to the defendant's use, I think he was clearly wrong. It is true, if the work and labor has been performed, or goods sold and delivered, or services rendered, under a special agreement, not under seal, and the remuneration was to be in money, the plaintiff, if he has performed his part of the contract, need not declare specially, but may recover the stipulated sum upon a general count, for work and labor, or materials found or goods sold and delivered, as the case may be: 1 Chit. on Pl. 239; *Harris* v. *Oks*, Bul. N. P. 139; and other cases cited by Mr. Chitty *ut supra;* and see the cases on this subject collected in 2 Peters, Abr. Tit. Assumpsit, 293 to p. 417, in margin. So if a man expends money for me, under a special agreement, in a particular way, to be repaid by me at sixty or ninety days, he may, after he has performed his part of the contract, and after the sixty or ninety days have elapsed, recover of me the money so expended, in an action for money paid; but I apprehend he can not recover more in such an action than the money actually expended, although by the terms of the special agreement, I was to pay him an advance or premium on his outlays.

But however this may be, the judge erred, in my opinion, in charging the jury that the possession of the tickets by the plaintiff was "sufficient evidence" that he had paid for them. If they were negotiable instruments, the plaintiff's possession of them would be *prima facie* evidence of his title to them and to the money due upon them, but they are not such instruments; they are mere evidences or memorandums to show how much the defendant was indebted to the several persons to whom he gave them; and no action can be brought upon them by anybody. This action is not brought on the tickets,

nor for the money due upon them; it is brought for money paid, laid out and expended for the defendant's use, and at his request; and consequently the plaintiff must support his declaration by proof; he must prove that he has paid money, or something equivalent to it; and he must prove how much he has paid, or he can not recover. This, however, is admitted, but it is insisted that the mere possession of the tickets amounts to such proof; that it proves not only that he paid for them, but how much he paid for them. In my opinion it proves neither; the most and all that can be said is, that the plaintiff's possession of the tickets is *prima facie* evidence that he came lawfully by them; and so he would have done if he had found them; or if they had been deposited with him for safe keeping; or if he had borrowed them; or merely received them from the owners for the purpose of collecting the money on them in this suit, for their benefit. Surely, then, the mere fact that the tickets are in his possession is no evidence that he actually paid money or goods for them, and much less of the amount he paid.

There is still another objection to this part of the charge. The agreement was, so far as can be collected from the evidence, that the defendant was to have thirty or sixty days' time to redeem them in. Now, if the possession of the tickets by the plaintiff was "sufficient" evidence that he had paid for them, it certainly was no evidence of the time whin he had paid for them: nor was it any evidence that he owned them or had paid for them before he brought the action.

It may be, as insisted, that no injustice has been done, but I can not say it has not; there is some reason to fear that the jury allowed for tickets which the plaintiff had not in his possession when the action was commenced, or which he did not obtain until after the defendant's agency at the furnace had ceased.

In my opinion therefore, the rule ought to be made absolute and a new trial granted. The costs to abide the event of the suit.

WHITE, J., concurred. ELMER, J., concurred in making the rule absolute. WHITEHEAD, J., did not hear the argument.

NEVIUS, J. (dissenting). The first reason assigned and urged

by the defendant for setting aside this verdict is, that the court erred in permitting these receipts or tickets to be read to the jury, without other proof than the handwriting of the persons who signed them, and without evidence of actual payment by the plaintiff, or the time that he received them. I perceive no error in this. The tickets were signed and issued by the persons there employed as weighers of the ore carted, and who were fully authorized to issue them. Whether they were in the service of the company or not, they are to be esteemed the agents of the defendant for this purpose, and their act in signing and issuing the tickets during the defendant's connection with the works, was binding upon him. Proof of their signature, and the plaintiff's possession of the tickets and the defendant's promise to pay the amount to the plaintiff if he would take them up, was sufficient to charge him. Nor was it necessary for the plaintiff to prove the actual payment of the amount of moneys specified in them, either in cash or any other mode. The proof that he was requested to take up the tickets, and the fact of his having them in possession, ready to be delivered up to the defendant, thereby discharging him from all liability to the original holders was presumptive evidence of payment, and whether paid in money or in goods or in his own notes, can not affect his claim. But it was insisted, that under a general count for money paid, the plaintiff could recover no more than he had actually paid and therefore it was incumbent on him to prove what he had paid in money or in goods. In this I think the defendant is mistaken. A plaintiff may recover on the money counts though there was a special agreement, provided the contract has been performed on his part. Mr. Justice STORY, in the *Bank of Columbia* v. *Patterson's Adm'r*, 7 Cranch, 303, remarks, "we take it to be incontrovertibly settled, that *indebitatus* assumpsit will lie to recover the stipulated price due on a special contract not under seal, where the contract has been completely executed." The same doctrine is laid down in 2 Saun. Rep. 350, note 2; Buller's N. P. 139; 2 Phil. Ev. 109, Amr. from 7th London Edition; 7 Vermont R. 223, 228; 24 Wend. R. 63. Here was a contract completely executed by the plaintiff in taking up the tickets; the stipulated price for this service was not the precise amount that the plaintiff might pay for them

but the amount of the tickets; that is, the sums mentioned in them. The plaintiff can not be esteemed as the mere agent of the defendant for this purpose, and therefore entitled only to the amount actually paid. He incurred risk, delay and responsibility, and for this he was to receive on his contract a stipulated price, which was the amount of the tickets. I see no error in the judge's charge on this point.

It is further objected, that the plaintiff did not prove that the tickets for which the jury rendered their verdict had all been taken up by him before the commencement of his suit, and before notice to him that the defendant had left the works and was no longer liable on his contract. He did prove that about the 1st of January, 1838, when the defendant left the furnace, he had at least one hundred and fifty dollars in tickets, and the court left it fairly to the jury to determine the fact whether the tickets produced were the same which the defendant procured the plaintiff to take up, and which he had taken up before notice that the defendant was no longer to be held responsible. In determining this question I find nothing in the case to warrant the conclusion that the jury committed a mistake.

It is also insisted that the court erred in refusing to permit the defendant to prove the contents of a letter written by the plaintiff, after proving its loss. The evidence of its being accidentally lost so as to entitle the defendant to this secondary proof, was by no means satisfactory. The witness stated that he thought the letter of too little consequence to preserve and could not say whether the person who delivered it to him took it back or not. If it was taken back, the defendant was bound to notify the plaintiff to produce it before he could prove its contents. If it was voluntarily destroyed by the witness, who was the defendant's agent, he was not entitled to show its contents. I see no error in this decision of the court.

A third ground relied on for a new trial is, that the court refused to let the defendant give in evidence the books of account of the company. It does not appear for what purpose they were offered. *Prima facie* they were not lawful evidence in this suit. The contract between these parties was an original one, and independent of the company, and could not be affected by other dealings between the plaintiff and

the company. The case does not show that they were improperly overruled.

Again, it is insisted that the jury should have allowed the defendant a credit for the fifty dollars paid by the company to the plaintiff. This question was left to the jury upon correct principles, and their decision should be final unless it is clearly shown that they committed a mistake; this has not been done.

Many other reasons were assigned in support of the motion for a new trial in this case, but were not pressed in the argument, nor do I find upon a careful examination of the whole case, that they are sustained. The cause appears to have been warmly contested, much evidence given on each side, and so far as the court was concerned, I apprehend it was fairly tried and fairly submitted to the jury by the charge. The defendant's undertaking was proved, his indebtedness to the plaintiff in some amount established, and I can not think that either the rights of the defendant or the law of the case calls for a new trial, and I am of opinion that the rule should be discharged with costs.

Rule absolute.

BRIGHAM ET AL. v. HAWLEY.

(17 Illinois, 38. Supreme Court, 1855.)

[1]**Recoupment.** Mutual demands arising out of the same subject-matter, although one arises *ex contractu* and the other *ex delicto*, capable of being balanced against each other, may be adjusted in one action.

Contract controls price. Where work is done under a special contract fixing the price to be paid, the contract will control the price whether it be reasonable or not. The contract must govern where it can be made to apply.

Error to Marion Circuit Court.

The declaration in this case embraced three special counts on the contract, and the general counts for work and labor, and *quantum meruit*. The special counts averred that Hawley was to quarry stone for wages, after the rate of eighty cents per yard; that he excavated, grubbed and stripped the earth,

[1] *Williams* v. *Schmidt*, *ante* 23.

preparatory to quarrying, etc., and one of the counts stated the contract at length. The defendants below pleaded the general issue, with a notice that they should prove that Hawley had been overpaid, and that a large quantity of quarrying tools had been delivered to Hawley, which he was to re-deliver when he discontinued to work, which he had refused to do; and claiming damage therefor, which was specified in a bill of particulars.

The cause was heard before BAUGH, J., and a jury, at September term, 1854, of the Marion Circuit Court; verdict and judgment for plaintiff below for $370.60 and costs. Motions for a new trial and in arrest of judgment were overruled.

The defendants below brought the cause to this court by writ of error.

J. N. HAYNIE and A. J. GALLAGHER, for plaintiffs in error, who were defendants below.

R. S. NELSON and HOUTS & HAMILTON, for defendant in error.

CATON, J.

This action was brought for the work and labor of opening a stone quarry, and for quarrying stone. It appears that a contract was made between the parties that the plaintiff should quarry stone for the defendants, without specifying the quantity, for which he should receive a stipulated price per yard, the defendants to furnish tools, which were to be kept in order by the plaintiff, who was also to load the stone on to the defendants' wagons. After the plaintiff had opened the quarry and had got out a considerable amount of stone, the defendants dismissed him and took possession of the quarry themselves, alleging as a reason, that the plaintiff was not getting out the stone fast enough for their purposes. Some complaint is also made that the plaintiff did not load the stone when required.

Upon the trial it appeared that the plaintiff, when he quit the work, took away the defendants' tools and secreted them, and that they were not found for ten or twelve days. "The defendants then offered to prove damages sustained by the defendants in hunting up tools after they were taken away, and the amount of money they were compelled to pay out to hands

in their employ, and who were left idle on account of said tools having been taken away, for which said defendants had an account filed, but the court excluded said evidence and defendants excepted." In this we think the court erred. This doctrine of recoupment was examined and settled in the case of *Stow* v. *Yarwood*, 14 Ill. 424. This court there said: "The principle plainly deducible from the adjudged cases is, that mutual demands arising out of the same subject-matter, and capable of being balanced against each other, may be adjusted in one action." And this principle is applicable, although one demand arises *ex contractu*, and the other *ex delicto*. In that case the action was trover for wrongfully taking and converting a steam engine, and the defendant was allowed to recoup the amount of work which he had done for the plaintiff in repairing the engine. So, in principle, is this case. The plaintiff's demand arises *ex contractu* and the damages which the defendants seek to recoup arise from the wrongful act of the plaintiff in taking away and secreting the tools. But those tools were a subject-matter of the contract out of which the plaintiff's demand arose. Under that contract he was entitled to the use of the tools while doing the work and by virtue of the contract he had possession of them. When he ceased to use them for the purpose stipulated, it was his duty to return them to the defendants. This duty he violated, and the defendants are entitled to reduce the amount of his demand against them, growing out of the contract, by the amount of whatever damages they have sustained by reason of that wrongful act of the plaintiff. Had the two demands not been thus connected together, as growing out of the same transactions, the rule would have been different. We think the court erred in excluding this evidence.

We also think the court erred in giving the fourth instruction for the plaintiff. That instruction was as follows:

"That, even although the plaintiff failed to comply with the contract on his part, still defendants are bound to pay plaintiff for all the work done by him which was received by defendants, or appropriated to their use, at a reasonable price, or what it was reasonably worth." Where work is done under a special contract fixing the price, that must constitute the measure of compensation, whenever the party is entitled to re-

cover at all, for the work done; whether the price agreed upon be greater or less than the real value of the work, makes no difference; the contract must govern, wherever it can be made to apply. What the work was reasonably worth or whether the price agreed upon be reasonable or unreasonable, have nothing to do with such a case and are entirely immaterial and irrelevant. This instruction therefore, which permitted the jury to allow the plaintiff what his work was reasonably worth, irrespective of the contract price, was improper as to the work, the price of which was fixed by the contract, and should not have been given to the jury.

The judgment must be reversed and cause remanded.

Judgment reversed.

RHOADES v. PATRICK.

(27 Pennsylvania State, 323. Supreme Court, 1856.)

Real and personal contracts distinguished—Stone severed from the realty. A widow who, under her husband's will, was entitled to one third of the proceeds of the farm and to occupy a room in the mansion house, brought suit before a justice of the peace on a note given to her for stone quarried from the farm. Defense that the justice had no jurisdiction, because the consideration of the note being stone, which was part of the realty, it was a real contract. *Held*, that a contract for the produce of land does not concern the realty, and the title to the land could not be brought in question. *Held*, also, that the true owner could not maintain trespass, because not in possession, nor assumpsit, because there was no contract with him.

Error to the Common Pleas of Armstrong County.

Barbara Patrick, who under her husband's will, occupied a room in the mansion house, and received one third of the proceeds of the farm, brought suit against Samuel Rhoades before a justice of the peace, on a note for $18.12, given for stone sold to him. The other part of the house was occupied by her sons. It does not appear by whose authority the stone was taken, or that Rhoades was notified not to pay the widow.

On appeal from the justice, the defense was that the consid-

eration of the note was stone, which being a part of the realty, the justice had no jurisdiction, because it was a real contract; also that there was no consideration from plaintiff to defendant to support the promise in the note.

The court (BUFFINGTON, P. J.) instructed the jury that the contract was personal, and the consideration sufficient, and this was the error assigned.

GOLDEN & FULTON, for plaintiff in error, who was defendant below.

PHELPS & TORNEY, for defendant in error.

The opinion of the court was delivered by BLACK, J. This was a suit commenced before a justice upon a note or single bill. The defense is rather curious. It is admitted that the note was executed by the defendant and delivered to the plaintiff without any fraud, imposition or mistake, for the just and fair price of certain stones, which the defendant does not deny that he got. But he says the consideration has failed because the plaintiff, though she was in possession of, had not a good legal title to the land from which the stones were taken; and having thus raised a question of title to realty, he insists that the justice had no jurisdiction.

The defendant has had the consideration for which he gave the note. It does not matter to him whether they come from land which the plaintiff owned or not. If she quarried and delivered them, they were her personal property at the time they were sold. If she was in possession of the land and gave him a license to quarry them, she is equally entitled to be paid the price agreed on. If there was a better title to the land in another person, he can not recover the value of the stones from the defendant. The true owner can not maintain trespass, for he was not in possession, nor assumpsit for there was no contract with him, either express or implied. A straightforward compliance with his bargain would have saved the defendant some trouble, and exposed him to no danger whatever.

A justice of the peace has no jurisdiction in a case of real contract when title may come in question. But a contract for the produce of land does not concern the realty. A man

who sues another for a load of coal is not obliged to show his right to the land from which it was mined. A claim for the price of wheat can not be defeated by setting up an outstanding title in a third person to the field where it grew. A person who has bargained with one in possession for a license to dig and carry away minerals can not, after enjoying the privilege, refuse to pay on the ground that somebody else had a better right to the possession. In these cases the title to lands and tenements may not and can not come in question. *Goddard* v. *McKean*, 6 Watts, 337; which the defendants counsel thinks so exactly like the present case, is as different as possible. That was a note given for the sale of an easement — a suit for the price of real estate, the title to which might come in question of course; for the want of a right to sell it would have been a good defense.

Judgment affirmed.

1. Waiver of tort and suit in assumpsit: *Byard* v. *Holmes*, 33 N. J. L. 119; *Post* FRAUD.

2. Assumpsit against vendor by assignee of vendee for product of oil wells: *Snow* v. *Thompson Co.*, 59 Pa. St. 209; *Post* CONTRACT.

3. Proof of inferior article of coal allowed under plea of non assumpsit: *Scott* v. *Kittaming Co.*, 89 Pa. St. 231; *Post* CONTRACT.

CHARLES V. ESHELMAN ET AL., EXECUTORS.

(5 Colorado, 107. Supreme Court, 1879.)

Probate practice—Jury. Under the statute (Gen. Laws, § 2918) claims against an estate may be tried in the county courts before a jury, and without formal pleading, as in ordinary trials before a justice of the peace. The fact that a county judge is permitted to exercise an equitable jurisdiction in the allowance of claims does not deprive the litigants of the right of submitting facts to juries, at least in actions not purely equitable.

Mining partners—Powers. If there be partnership property, and also separate property of a deceased partner, the partnership debts are to be paid out of the proceeds of the joint estate, and the individual debts out of the proceeds of the separate estate. In the exercise of equitable jurisdiction in the allowance of claims county courts are strictly restrained from infringing on this rule. The reason assigned for the distinction between the ordinary commercial partnership and a mining partnership, and for limiting the powers of the partners of the latter class, is that a mining partnership is not founded on the *delectus personæ*, whereas the other class is. The powers of members and managers of mining partnerships are limited to the performance of such acts in the name of the partnership, as may be necessary to the transaction of the business, or which is usual in like concerns.

No power to bind associates to payment of counsel. The employment of counsel to litigate the title to the mine does not come within the limited powers vested in a mining partner, but this rule does not apply to incorporate mining associations, nor to partnerships formed under the statutes.

Principal and agent—Ratification. The rule is that whenever a party undertakes to do an act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible to the person with whom he is dealing on account of his principal. Ratification can only be effectual between the parties when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent.

Appeal from the County Court of Jefferson County.

J. Q. CHARLES, appellant *pro se*.

R. S. MORRISON, for appellee.

BECK, J.

The appellant was employed in his professional capacity as a lawyer by the deceased, John H. McMurdy, to manage

and attend to certain suits involving the title of the Dives mine at Georgetown. McMurdy was one of the owners of the mine, and was, at the time of employing appellant, acting as its manager. After his decease, the professional services rendered not having been paid, appellant presented his account therefor to the County Court of Clear Creek County and caused it to be filed as a demand against the estate. Objections to its allowance were make by the executors, and the issue of fact as to the liability of the estate was submitted to a jury, who returned a verdict for the appellees. A new trial and change of venue were granted, and the cause removed to the County Court of Jefferson County, where the issues were again submitted to a jury, against the appellant's objections, and a like result followed, the jury returning a verdict for the estate.

The first error assigned is, that the court erred in permitting the cause to be tried by a jury. There was no error in this. The statute provides that "the manner of exhibiting claims against estates shall be by filing in the county court the account or instrument of writing, or an exemplification of the record whereon such claim is founded. Formal pleading shall in no case be required; but the issues shall be formed, heard and determined in the same manner as in actions before justices of the peace." (General Laws, section 2918.)

It will be perceived that the statute provides the mode of trial as well as the formation of the issue. Section 1506 provides that, "at any time before evidence is given in any suit before a justice of the peace, either party, upon advancing the jury fees, may demand to have the cause tried by a jury," etc. It was evidently the intention of the legislature to adopt the same practice in respect to trials of issues of fact in the county court, when sitting for the purpose of the adjudication of claims against the estate of deceased persons, as in ordinary trials before justices of the peace, and the fact that the court is permitted to exercise an equitable jurisdiction in the allowance of claims, does not deprive litigants of the right of submitting questions of fact to juries, at least in actions not purely equitable.

The other errors assigned relate to the conduct of the trial, the giving and refusing instructions, and in overruling appellant's motion for a new trial.

The appellant's claim, as presented, was for a sole employment by McMurdy; the defense interposed was, that it was a general employment in the name and for the joint benefit of a partnership, and concerning the partnership property; and as such the estate was not liable, but that the claim must be presented against the survivors only. The appellant controverts the proposition that it was a joint employment, but insists that if it was, the county court would have jurisdiction to allow the claim as an equitable demand against the estate of the deceased, on the principle that partnership debts are joint and several in equity.

The English rule is, that all partnership contracts are to be held joint and several in equity, and that upon the death of a partner a creditor of the firm may proceed at once in equity against the estate of the deceased, whether the firm or the surviving partners be solvent or otherwise; but it requires that the surviving partners be made parties to the bill, because they are interested in taking the account. Parsons on Partnership, Sec. 448; 1 Story's Eq. Jur. 676.

This rule has been greatly modified by statute in this country. Our statute upon the subject of wills, executors and administrators is similar to the statute of Illinois on the same subject, its main provisions being a transcript of that statute. We may, therefore, look into the decisions of the courts of that State for rules to guide us in the construction of this statute. The rule there adopted is, if there be partnership property and also separate property of a deceased partner, the partnership debts are to be paid out of the proceeds of the joint estate, and the individual debts are to be paid out of the proceeds of the separate estate. *Pahlman Ex'r etc.* v. *Graves*, 26 Illinois, 405.

It will be observed that while it is held that courts of probate may exercise an equitable jurisdiction in the allowance of claims against estates of deceased persons, such courts are strictly restrained from infringing on the foregoing rule.

In the case of *Moline Water-power and Manufacturing Company* v. *Webster*, 26 Ill. 239, Chief Justice CATON says:

"We wish to be distinctly understood, that no claim should be allowed against the estate for a partnership debt, till it is shown that all the partnership assets have been exhausted. Till this is done, no equitable claim ever arises against the estate." See, also, *Pahlman Ex'r* v. *Graves*, *supra*, p. 408.

The appellant's position, therefore, that if the claim should be found to be a partnership debt, and not the individual debt of the testator, the probate court had jurisdiction to allow it in this proceeding as an absolute demand against the estate, can not be sustained. In order to save the bar of the statute, however, in the event that the partnership assets in any case should prove insufficient to liquidate the partnership debts, it would be proper to have the claim exhibited, and filed in the county court against the estate, within the time and in the manner required by statute.

The whole testimony in the cause, however, falls far short of establishing that an ordinary partnership existed between McMurdy and the other persons named by the witnesses as interested in the Dives mine. It does appear that the mine was owned as tenants in common by the deceased and other persons. According to the testimony of Hamill, the owners were McMurdy, Wilcox, Marfield, Sowerby, Payne, Story, Purdue, Jackson and Logan, and he says some others claimed to be owners. The interests of the several parties appeared to have differed, both in nature and extent, some owning undivided interests jointly, while others owned adjoining claims upon the lode; thus McMurdy owned one third of the mine, and Payne and Sowerby one fourteenth, while Story owned 233 feet, and Logan 100 feet. This witness says McMurdy acted as manager, but thinks he had no authority to act from Payne, Sowerby and Wetherell. No contract of partnership was proven. In such case it would not be within the scope of the authority vested in a mere manager of the working of the mine, although himself an owner, to employ an attorney in the name of all the proprietors, to prosecute and defend litigations concerning the title of the property. Without special authority for that purpose, such a contract, if made, would not bind his co-owners.

The evidence does not warrant an inference that an ordinary

partnership relation existed between the several proprietors. At most, it shows what has been denominated a mining partnership; a relation that would not authorize one member to bind the partnership by a contract of this nature without the assent of the individual members. A mining partnership is held to exist where the several owners of a mine co-operate in the working of the mine, and it is held that this relation is governed by many of the rules relating to ordinary partnerships, but differs therefrom in many important particulars; as for example, a member may assign his interest without the consent of his copartners, and the act does not work a dissolution of the partnership; the person to whom the interest is assigned becomes a member of the company, and it is not necessary that the other members consent thereto. Neither does the death of a member dissolve the partnership. Another peculiarity is that a partner has not the power to bind his associates by engagements with third persons, to the extent that a member of a trading or commercial firm may do. The law does not imply any authority to a member of a mining partnership to execute a promissory note, or to draw or accept a bill of exchange.

The reason assigned for the distinction between the ordinary commercial partnership and a mining partnership, and for limiting the powers of partners of the latter class, is, that a mining partnership is not founded on the *delectus personæ* whereas the other class is. New members come into a mining association against the wishes of other members, and it is held that to subject the owners, under such circumstances, to personal liabilities not authorized by them, but contracted, it may be, by those who became members against their wishes, would be unjust. For these reasons it is held the powers of members and managers of such companies are limited to the performance of such acts, in the name of the partnership, as may be necessary to the transaction of its business, or which is usual in like concerns. *Skillman* v. *Lachman*, 23 Cal. 200; *Duryea* v. *Burt*, 28 Cal. 569, and cases therein cited.

It is evident that the act of employing counsel to litigate the title of the mine, does not come within the limited powers vested in a mining partner. These observations have no reference to mining associations incorporated, nor to partnerships

formed under the provisions of the statutes. No doubt a partnership may be formed for mining purposes, that would possess all the elements of a commercial partnership, and which would subject its members to the same rules and liabilities, but there is no testimony in the record that such a partnership relation existed in this case.

This being so, the instructions given on the part of appellees were not warranted by the testimony, and were calculated to mislead the jury. By these instructions the jury was advised in substance, that if the appellant was employed in behalf of the owners of the Dives mine, or to act as attorney for the Dives lode generally, that no recovery could be had. This was manifest error. It was the province and duty of the jury to inquire whether McMurdy was authorized by the owners to employ counsel in their names, as well as to find whether he had in fact assumed to do so; and the jury should have been so informed. The force of the instructions as given, is that if he assumed to employ the counsel for the owners, the latter, and not the estate of the deceased, is bound, thus wholly ignoring the essential element of a binding contract—the authority of the party to make it.

If McMurdy assumed, without authority, to contract for the company, he, and not the company, became bound, and in such case the claim should have been allowed. The rule is that "whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible to the person with whom he is dealing on account of his principal." Story on Agency, Sec. 264.

There was some testimony tending to show that the owners of the mine ratified the employment of appellant. Such testimony would only be material if the hiring was in the name of the owners, for a ratification can only be effectual between the parties when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent. Story on Agency, Sec. 251.

We find but little in the testimony to warrant the conclusion that deceased assumed to contract for any one but himself. He appears to have been thus understood by appellant and his

clerk, at time of the employment, and the retainer and fees were charged against him individually. If he contracted in his own name, appellant would not be bound by a ratification by the company, if proven.

In order to make out the defense in this case, the burden of proof was on the appellees to establish by testimony the joint character of the debt, and the authority of the deceased to contract it; or that it was contracted on behalf of the owners of the mine, and subsequently ratified by them. In this they have signally failed, and the verdict is not only against the weight of evidence, but is wholly unwarranted by it, and should have been set aside.

For these errors the judgment must be reversed and the cause remanded.

Judgment reversed.

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[1] ROGERS v. R. E. LEE MINING CO. ET AL.

(2 Col. L. R. 182. United States Circuit Court, District of Colorado, 1881.)

Attorney and client—Purchase by the former from the latter. *Query:* Can an attorney at law, under any circumstances, purchase *pendente lite* from his client the subject-matter of a litigation in which he is employed and acting? Equity will not uphold such sale, even upon a showing of good faith, where it appears that the attorney, while negotiating for the purchase of the property, was, at the same time, and as part of the negotiation, advising his client as to the probable outcome of the litigation concerning it.

Burden of proof to sustain. To sustain a sale from client to attorney, the burden is upon the latter, and he must show that he has done as much to protect the client's interests as he would have done in the case of his client dealing with a stranger.

Attorney must make full disclosure. An attorney, before consummating a purchase from his client, is bound to disclose to the latter the names of all persons interested with him in the purchase, especially when some of the persons so interested are partners of the client in the subject-matter of the litigation.

Parties interested with the attorney in such purchase. Parties interested with the attorney in such purchase, and who afterward take conveyances from him, can not be regarded as innocent purchasers; but such persons stand in the shoes of the attorney, so far as the rights of his client are concerned. If the sale is void as to the attorney, it is also void as to those interested with him as such partners.

[1] A rehearing has been granted in this case: 13 Fed. R. 59. The further proceedings will be found under VENDOR AND PURCHASER.

LUTHER S. DIXON, for plaintiff.

WELLS, SMITH & MACON, for defendants.

MCCRARY, Circuit Judge.

First. It is not necessary to decide the question whether an attorney at law can, under any circumstances, purchase *pendente lite* from his client, the subject-matter of a litigation in which he is employed and acting.

Second. Equity will not uphold such a sale, even upon a showing of good faith, where it appears, as in this case, that the attorney, while negotiating for the purchase of the property, was at the same time, and as part of the negotiation, advising the client as to the probable outcome of the litigation concerning it.

It is difficult to see how it is possible for an attorney, under such circumstances, to deal with his client at arms-length; for the client's acceptance or rejection of any proposition for a purchase by the attorney must depend upon the nature of the advice he receives from him touching the pending litigation. In other words, the attorney must, as to an important part of the negotiation, represent both sides; that is, his own private interest, and the opposing interest of his client, a thing which is manifestly contrary to law and abhorrent to equity.

The client must, in such a case, act upon the attorney's advice and opinion as to the merits of the pending litigation about the property, and by the light of such advice he must fix the price at which he will sell. Even if under some circumstances the property in controversy in a suit, may, pending the suit, be sold by the client to the attorney, I am of the opinion that a court of equity ought to hold that such a sale is absolutely void, if the attorney, while negotiating as a purchaser, is called upon to advise the client as an attorney, as to how far a pending litigation is likely to affect his title to the property, or the value of his interest therein.

It is contrary to the policy of the law, and certainly contrary to the principles of equity, to permit an attorney at law to occupy at the same time and in the same transaction the antagonistic and wholly incompatible position of adviser of

his client concerning a pending litigation, threatening the client's title to property, and that of purchaser of such property from the client. If an attorney can deal with his client concerning such property at all, he must before doing so, for the time at least, divest himself of the character of attorney, so that his former client may deal with him as a stranger. This is not the case when the attorney negotiates with the client as the purchaser of such property, and at the same time advises him as counsel concerning the title to it, or concerning its value, as affected by pending litigation.

Third. To sustain a sale from client to attorney, the burden is upon the latter, and he must show that he has done as much to protect the client's interests as he would have done in the case of his client's dealing with a stranger.

The court will watch such a transaction with jealousy, and throw on the attorney the burden of proving that the bargain is, generally speaking, as good as any that could have been obtained by due diligence from any other purchaser.

An attorney can not in any case sustain a purchase from his client without showing that he communicated to such client everything necessary for him to form a correct judgment as to the real value of the subject of the purchase, and as to the propriety of selling for the price offered. And neglect of the attorney to inform himself of the state of the facts will not enable him to sustain a purchase from his client for an inadequate consideration.

The attorney must show that all the considerations which should have operated to prevent the sale by the client were presented by him with the earnestness of a man who was anxious only for the client's good.

It must be made to appear that the client is no worse off than he would have been had he consulted an adviser who had no interest and no selfish end in view. It must appear also that the attorney took such measures to inform himself as to the value of the property offered for sale by the client as are ordinarily taken by persons dealing in such property under like circumstances, and that being himself thereby informed, he communicated all his information upon the subject to his client. Authorities by which these general rules are established will be found cited in Weeks on Attorneys at Law, un-

der the head of Dealings between Attorney and Client, pages 450 to 469, and in White and Tudor's Leading Cases in Equity, Hare and Wallace's Notes, volume 2, part 4, pages 1216 to 1225. It does not, in my opinion, appear that respondent Marshall cautioned and advised his client, the complainant, as fully as the law, as above set forth, required.

An attorney who knows nothing of the value of property offered for sale by his client, and is aware that his client is in like ignorance upon that subject, is bound, before advising a sale by the client to a stranger, and *a fortiori* before attempting to purchase from the client himself, to make careful inquiry and to inform himself as fully as possible concerning such value. If a stranger had appeared and opened negotiations with complainant for the purchase of her interest in the mine, and she had applied to Marshall as her attorney for advice concerning the sufficiency of the price offered, it would have been his duty, being himself ignorant upon the subject, to advise an investigation by a competent person, as a means of ascertaining the probable or approximate value of the property.

It is true that Marshall had, up to the time when the negotiations for a purchase by him commenced, been the attorney of complainant, only for the purpose of defending her title, and having no occasion to inquire into the question of the value of the mine, but the moment these negotiations were opened, the relation was changed, and it became his duty to use due diligence to ascertain the value of the property as nearly as possible, and to advise complainant or her agent. It was at least his duty to suggest an investigation by the usual method. If he had, without knowledge as to the value of the property, and without suggesting an investigation, advised a sale to a third party at a price which proved to be inadequate, it is clear that he would have failed in his duty, and it is equally clear that he could not purchase under like circumstances.

His own ignorance as to the value of the property, so far from being a circumstance in his favor, is a strong reason for holding that he was bound to inform himself, so as to be able to advise his client.

Fourth. I hold further, that the respondent Marshall, before consummating his purchase from complainant, was bound

to disclose to her or her agent, the names of all persons interested with him in the purchase, and especially that her partners in the mine were secretly interested as such purchasers.

The rule is, that the attorney must make a full disclosure of every fact which might influence the decision by the client of the question of the sale. All the presumptions are against the attorney.

The court can not presume that the fact that her partners were secret purchasers with Marshall, would have had no influence upon complainant's mind if disclosed. If it had been known by her that her copartners wished to purchase part of her interest, and yet did not wish her to know the fact, and had therefore employed Marshall to purchase in his own name for them, it might well have aroused suspicion in her mind, and very probably would have led her to decline to sell, or caused her to employ other counsel, or to institute further inquiry as to the character and value of the property. It has been held that if an attorney can show that he is entitled to purchase property, notwithstanding his character of attorney, yet if instead of openly purchasing it, he purchases it in the name of a third person without disclosing the fact, the purchase is void: Weeks on Attorneys at Law, p. 463, and cases cited.

The same rule must prevail where the attorney, while professing to purchase for himself from his client, really purchases in part for his client's copartners and suppresses this fact.

Fifth. The parties interested with Marshall in the purchase, and who afterward took conveyances from him, stand in his shoes, so far as the complainant's rights are concerned. They knew that the relation of attorney and client existed between complainant and Marshall, and they took the chances as to the validity of the latter's purchase. If the sale was void as to him it is also void as to them, and, in that case, it is unnecessary to inquire into the allegations or examine the proofs as to misconduct on the part of complainant's failures in connection with the sale in question.

When an attorney purchases from his client in his own name, but in secret trust for third parties, it will not, of course, be insisted that such third parties can be regarded as innocent

purchasers, or as entitled to any greater rights or better title than the attorney himself secures.

1. Proof of services rendered corporation: *Hillyer* v. *Overman Co.*, 6 Nev. 51; *Post* CONTRACT.

2. Cases involving champerty: *Hilton* v. *Woods*, L. R. 4 Eq. 432; *Post* MEASURE OF D.; *Roberts* v. *Cooper*, 20 How. 467.

3. Knowledge of attorney affecting contract: *Tatham* v. *Lewis*, 65 Pa. St. 65; *Post* FRAUD.

4. Recovery for legal services, on injunction bond: *Campbell* v. *Metcalf*, 1 Mont. 378; *Post* INJ. BOND; *Allport* v. *Kelley*, 2 Mont. 343; *Gear* v. *Shaw*, 1 Pinn. 609; *Post* INJ. BOND.

THOMPSON, ASSIGNEE, v. TOLAND, ADM'R, ET AL.

(48 California, 99. Supreme Court, 1874.)

Pledge of stock held in trust—Quasi negotiability of stock. In California mining stocks properly indorsed pass by delivery. T. & B., brokers, held certain mining stocks as collateral security to the note of K., who knew that there was nothing upon the face of the certificates to indicate the real ownership. These brokers pledged both this note of K. and its collateral stock to S. & Co. to secure a debt of their own. *Held*, 1. That the transaction was valid as against K., so far as to deprive him of the stock without recourse against its holders, but being (from outside circumstances) a fraud under the Bankrupt Act, it was void as to the other creditors of T. & B.

Sale of pledge without notice, not void as to strangers. 2. That a sale of stock by the pledgee, without previous demand and notice, gave no right of action to K., who was a stranger to the contract of pledge, but that such sale was a conversion of the stock as to the other creditors of T. & B., and that their assignee in bankruptcy could recover its full value from S. & Co.

With stock, quantity is equivalent to identity. 3. That it was not incumbent upon S. & Co., upon a redemption of the pledge, to return the identical certificates pledged, but it would be sufficient to restore certificates of stock corresponding to those received.

Appeal from the District Court of the city and county of San Francisco, Twelfth Judicial District.

Tilden & Breed were brokers in San Francisco, and engaged in buying mining stocks on commission for others, and when they loaned a portion of the money to make a purchase, were in the habit of keeping the stock purchased as their security. Joseph L. King employed them as his brokers, to buy mining stocks, and entered into a contract with them, which is contained in the following letter:

SAN FRANCISCO, March 21, 1868.

JOSEPH L. KING, ESQ., Virginia:

Dear Sir:—In conversation between yourself and our Mr. Tilden, a few days since, certain general arrangements were made as a basis upon which our business relations should be conducted. In order to prevent any possible misunderstanding of the same in the future, we deem it best to state what is our understanding of the position which we relatively occupy toward each other as agent and principal.

1. We to buy and sell stock in such manner as you may direct, for your account; our brokerage to be: On purchases or sales from one dollar to ninety-nine dollars inclusive, one half the commissions of the San Francisco Stock and Exchange Board. On purchase or sales at or over one hundred dollars, one half per cent. on amount.

2. You to have an overdraft, not to exceed twenty-five thousand dollars, on us, the amount of overdraft to be secured by mining stocks or other collaterals, at a margin of fifty per cent. on purchase money. Interest the same as charged us by the bank.

3. When margins on any stock are exhausted, we to have the privilege of telegraphing to you for additional deposit (in which case you would be justified in calling upon your principal).

4. Upon your being advised of purchases, you will remit fifty per cent. of the amount of purchase, we to retain the stock; except when you desire the stock sent you, you will so telegraph, and we draw against you for full amount, and except when there is a balance with us in your favor, either from sales or otherwise, you will remit only the difference between your credits and fifty per cent. of purchases.

5. On all time purchases or sales with money deposits, you to remit the twenty per cent., or the same to be deducted from your credit balance.

6. Telegrams to be at your expense and risk, except when it is our error, when we are charged with the same, and except upon telegraphic charge on your remittance, which we also pay. Any errors resulting from deficiencies in telegraph office to be at your risk. Profit or loss to be yours; we to be accountable only for such mistakes as are made in our own office. Cost of stamps and discount on exchange drawn against you to be yours.

We have given in the above, our understanding of the terms upon which we are to transact your San Francisco business. The accounts will be sent you twice in each week on specified days. In all business transactions we are to be considered as simply agents for you—you to be our principal. Should the proposition above stated be the same as you understand as the basis of our correspondence, please signify

your acceptance of the same. If there be any omission or discrepancy, please notify us at an early date. At the commencement of our business, we hope you will make your overdraft as light as possible, as money is quite tight just now, and we are using quite a large amount at present in our own business.

We omitted to state that all purchases and sales shall be considered "regular," *i. e.* settled next day, so you can remit or draw on the morning next succeeding the day of transactions. If we sell s-3, you will have credit the day after the sale; if we buy cash, or buy s-3, and the stock is delivered same day, you will not be charged until the day after.

Hoping to hear from you at an early day,

We remain your obedient servants,

TILDEN & BREED.

Under the agreement, Tilden & Breed bought mining stock for King when he directed, furnishing a portion of the money, and keeping in their possession the stocks purchased. The certificates were issued by different mining corporations, and were in the following form:

"Certificate 962. No. shares, 10.

"SAN FRANCISCO, May 28, 1868.

"Crown Point Gold and Silver Mining Company.

"This certifies that Joseph Tilden——is entitled to ten shares of the capital stock of the Crown Point Gold and Silver Mining Company. Transferable on the books of the Company by indorsement hereon, and surrender of this certificate.

"CHARLES E. ELLIOT, Secretary.

"A. HAYWOOD, President."

Most of the certificates had the word "trustee" inserted in the blank after the name of the person to whom issued. On the back of each certificate was the following:

"For value received, I do hereby sell and assign unto——— ——— shares of the capital stock of the within Company, standing in my name on its books.

"Witness my hand this ——— day of ——— 186–."

The certificates of stock purchased by Tilden & Breed for King were issued by different mining corporations, and were issued to several persons. On the 31st day of August, 1868, Tilden & Breed failed, and were indebted to John Sime & Co.,

bankers, composed of John Sime, B. F. Hastings and Joseph M. Douglass, about thirty-five thousand dollars. They had mining stocks in their hands purchased for King, and had King's note for the balance he owed them. To secure Sime & Co. they assigned to them the stocks they had purchased for King, by filling up the blank indorsement on the back, and delivered the same, and also King's note to Sime & Co. Before this assignment was made, Sime & Co. were informed that Tilden & Breed had pledged the stocks to F. Livingstone, as security for a loan of about nine thousand dollars; and, in order to obtain the stocks, Sime & Co. allowed Tilden & Breed to draw a check on their bank for the amount due Livingstone, which they certified, and with this check Livingstone was paid, and the stocks were delivered to Sime & Co. September 1, 1868, King called on Sime & Co., and asked to see the stocks. They were shown to him, when he informed them that the stocks were bought for him by Tilden & Breed. Sime & Co. declined to recognize him as having any interest in the stocks. All the certificates of stock, except five shares of Belcher, and four shares of Gould & Curry, which were issued to King, and by him indorsed, and fifteen shares of Crown Point, which were issued to Tilden, stood in the names of various persons, and were by them indorsed, and none of them indicated upon their face that any person other than the possessor was the owner. King resided in Virginia, in the State of Nevada, and sent his orders to San Francisco for the purchase of the stocks. King became insolvent, in July, 1868, and on the 4th day of August, 1868, settled with Tilden & Breed, and gave them his note for the balance due, twenty-nine thousand four hundred and eighteen dollars and six cents. This note Tilden & Breed, between the 1st and 5th of September, 1868, delivered to Sime & Co. as collateral security for their debt. On the 7th of December, 1868, Tilden & Breed filed their petition in bankruptcy in the United States District Court. April 21, 1870, H. C. Hyde, their assignee, brought suit against Sime & Co. to recover the stocks or their value, as the property of Tilden & Breed, converted by Sime & Co. to their use, in fraud of the creditors. June 15, 1871, that court gave judgment in favor of Hyde for four thousand one hundred and thirty-eight dollars and fifty cents. Sime & Co. paid the judgment Sep-

tember 4, 1871. King was adjudged a bankrupt in the United States District Court, on the 6th day of June, 1871, and the plaintiff in this action was appointed his assignee. No offer was made to pay to Sime & Co. King's note, or the money they paid Livingstone, or the amount ($35,843.38) which Tilden & Breed owed them. The complaint in this action was filed October 5, 1871, and after Sime and Hastings had appeared in the action; and on the 13th day of October following, Sime died, and defendant Toland was appointed the administrator of his estate. The administrator was made a party to the action. The stocks were worth about two hundred thousand dollars when the suit was commenced. On the 14th day of November, 1871, Sime & Co., Benjamin F. Hastings, surviving partner, and individually doing business under the name of John Sime & Co., were, on the petition of creditors, adjudged bankrupts, and in December, 1871, defendants White and Bradford were appointed trustees in bankruptcy of the estate of the bankrupts. The defendants recovered judgment in the court below, and the plaintiff appealed.

The other facts are stated in the opinion.

JAMES L. CRITTENDEN and CALHOUN BENHAM, for appellant.

G. W. GORDON and WILLIAMS & BIXLER, for respondent Toland; JOHN B. HARMON and WILLIAMS & THORNTON, for the other respondents.

By the Court, CROCKETT, J.

In the view we take of this case, it will be unnecessary to consider many of the points which have been elaborately discussed by counsel. There is no conflict in the evidence to the effect that when the stock certificates in controversy were delivered to Sime & Co., as collateral security for the indebtedness of Tilden & Breed, they were properly indorsed, so as to pass by delivery. There was nothing on the face of them to raise a suspicion that they were not the property of Tilden & Breed; and the jury finds, on evidence substantially conflicting, that Sime & Co. received the certificates in good faith, and without notice of King's alleged equities. We, therefore, can not disturb the verdict on this

point. The jury also finds that the certificates were delivered to Sime & Co. with the consent of Tilden & Breed, as collateral security for the indebtedness of the latter firm to the former, for a sum exceeding thirty-five thousand dollars, no portion of which has been paid or tendered. We think the evidence warranted this finding, and that Tilden & Breed assented to the delivery of the certificates and their hypothecation, as above stated. King had permitted the certificates to remain in the hands of Tilden & Breed, indorsed in such manner that they would pass by delivery, and with nothing on their face to indicate that he had any interest in them, or that they were not the property of Tilden & Breed, whom he has clothed with all the usual *indicia* of the ownership of mining stocks. He had placed them in a position to deal with the stocks as though they were the absolute owners. They could at any time have caused them to be transferred on the books of the respective mining corporations into their own names, and any purchaser or pledgee holding under them could also have done so. If they had no right under the contract between them to sell or hypothecate the stocks except with his consent, he nevertheless clothed them with such an apparent ownership as to mislead the public, and to enable Tilden & Breed to hold themselves out as the owners, and thus defraud innocent persons dealing with them in good faith. Under such circumstances, the party who places another in a position to enable him to practice the fraud should suffer the loss rather than an innocent person who deals with him on the faith of the usual *indicia* of ownership with which the true owner has invested him.

If King had desired to preserve his alleged rights, and to prevent an abuse by Tilden & Breed of the secret trust on which it is claimed they held the stocks, he should have seen to it that the nature of the trust appeared on the face of the certificates, or in some other method have placed it out of their power to deal with the stocks as their own. In this State, mining stocks, properly indorsed, pass by delivery almost as currently as bank notes; and if the true owner places them, or knowingly allows them to remain in that condition in the hands of another, on some secret trust between them, he, and not an innocent purchaser or pledgee, must

bear the loss resulting from a breach of the trust. This point was substantially decided in *Brewster* v. *Sime*, 42 Cal. 139, and we see no reason to doubt the correctness of the proposition. We are therefore of opinion, that the transaction between Sime & Co. on the one side, and Tilden & Breed on the other, is to be treated, for the purposes of this action, as though the latter had the absolute right as against King, to pledge the stocks on the 31st of August, 1868, when they were hypothecated. It appears however, that the district court of the United States, in an action between the assignee in bankruptcy of Tilden & Breed as plaintiffs, and Sime & Co. as defendants, held the hypothecation to the latter, under the circumstances, to be a fraud upon the bankrupt law, and, therefore, void as against the other creditors of Tilden & Breed. It therefore compelled Sime & Co. to account to the assignee for the value of the stocks. But this can not improve the status of the plaintiff in this action. Though void under the bankrupt law as against the other creditors of Tilden & Breed, the transaction was valid as against King and every one else; and when Sime & Co. paid to the assignee of Tilden & Breed the value of the stocks, they thereby acquired whatever title the assignee had to them. The effect of the satisfaction of that judgment was to vest the title of the assignee in Sime & Co. But so far as King's rights are concerned, they are no greater than they were before. The case then resolves itself into this: that Sime & Co., in good faith and without notice of King's alleged equities, received these stocks from Tilden & Breed, who were the apparent owners, with the usual *indicia* of ownership, as a pledge to secure the payment of a subsisting debt, which has never been paid or tendered. Under these circumstances, King's alleged rights, founded on the secret trust between himself and Tilden & Breed, are subordinate to those of the pledgee's. It remains to be considered to what extent, if at all, King's rights are affected by the fact that Sime & Co. sold a portion of the stocks and converted them to their own use, without a previous demand and notice. As we have seen, the stocks are to be deemed as against King, to have been held by Sime & Co. under a valid pledge to secure a debt due from Tilden & Breed.

If Sime & Co. have unlawfully sold and converted the stocks without a previous demand and notice, it was the rights of Tilden & Breed, the pledgors, and not those of King, which were injuriously affected. The contract of pledge was between Sime & Co. and Tilden & Breed; and the right of action for violation of the contract or a breach of duty by the pledgee, was in the pledgors and not in a stranger to the transaction.

It is a sufficient answer to any action by King founded on his supposed rights, if any he has outside of the contract of pledge between Sime & Co. and Tilden & Breed, that the stocks were held under a pledge which was valid as against him, and to which he was a stranger, and that the debt for which they were pledged has not been paid or tendered.

Among the numerous rulings of the court below, which the plaintiff claims to have been erroneous, we discover no error which could injuriously affect the plaintiff in the view we have taken of the case.

Judgment and order affirmed.

By the Court, CROCKETT, J., on petition for a rehearing.

A rehearing is asked on the ground that by the uncontradicted testimony of Newcomb, when Sime & Co. received the stocks, and particularly those pledged to Livingstone, Sime had express notice that they belonged to King. The jury found otherwise; and it is insisted that the verdict on this point is not only wholly unsupported by any evidence in the cause, but is directly contrary to the testimony of Newcomb. It is to be observed, however, that Sime died pending the action, and his testimony was not obtained. The only evidence of express notice to Sime is to be found in the testimony of Newcomb, relating to a conversation between them, at which no one else was present. The conversation occurred on the day of the failure of Tilden & Breed, and amidst the confusion and excitement naturally attending such an event. It was a conversation between a clerk of the bankrupt firm and one of its creditors for a large sum, eagerly in search of information as to its assets. Evidence of a conversation, resting only in the memory of a single witness, is ordinarily the most unsatisfactory of all evi

dence. Conversations are so easily misunderstood, particularly under circumstances of excitement, and the human memory is so treacherous, that testimony of this character is held by all courts to be the weakest of all evidence. Moreover, Newcomb was contradicted by Hastings in respect to some of the circumstances attending the giving of the check to redeem the stocks from Livingstone, and on his cross-examination he testified that Sime & Co. "knew from me that the stocks in Livingstone's possession belonged to King, or a portion of them, anyway; but I don't testify, and I have not testified that I told them in so many words that they were King's stocks." Under these circumstances, while there is nothing to impeach his integrity, we can not say that the jury was not authorized to distrust the accuracy of Newcomb's recollection of the conversation. It was incumbent on the plaintiff to prove notice to Sime & Co. of King's equities; and, under the circumstances already stated, it was for the jury to determine whether the evidence on this point was sufficiently satisfactory to establish affirmatively the fact of the notice. Their finding being in the negative, we would not be justified in setting aside the verdict on the ground that it is unsupported by the evidence. But, waiving this question, we think the judgment ought to be affirmed on another ground. There can be no doubt that Tilden & Breed were entitled to hold the stocks as collateral security for King's note. The note itself, and the stocks as collateral security for its payment, were delivered to Sime & Co., as collateral security for the indebtedness of Tilden & Breed. It can not be doubted that Tilden & Breed, the holders of King's note, had the right to pledge it to Sime & Co., and to deliver to them, as collateral security for the note, the stocks held in pledge to secure its payment. Though this transaction was held to be a fraud on the Bankrupt Law as against the creditors of Tilden & Breed, and void as against them, it was, nevertheless, valid as against King. As to him, Sime & Co. became the lawful holders of the note, and of the stocks, as collateral security for it. As pledgee of the stocks, holding them for the security for King's note, it would not have been incumbent on them, upon a redemption of the pledge, to return to the pledgor the same identical certificates which they had received, but it would have been a

sufficient discharge of their duty as pledgees to have kept on hand, and to have been ready at all times, on a redemption of the pledge, to restore to the pledgor certificates of stock corresponding to those received of the pledgor: *Atkins* v. *Gamble*, 42 Cal. 86, and cases there cited. The mere fact, therefore, that Sime & Co. had sold these particular certificates, did not of itself render them liable as for a conversion of the pledge. If they had continued to be the holders of King's note, he could not have put them in default, except by a tender of payment and a demand for the stocks; and they would not have been in default, if upon such tender and demand they had offered to restore to them other similar certificates, and had shown that they had at all times been ready to do so. But he could not have maintained the action without a tender and demand. It appears, however, the District Court of the United States held the transaction between Sime & Co. and Tilden & Breed, to be void as against the creditors of the latter, and compelled Sime & Co. not only to surrender the note, but to account for the value of the stocks. The effect of this decree was to adjudge that as between the assignee of Tilden & Breed and Sime & Co. there had been no valid pledge of King's note and the stocks as collateral security for its payment. In other words, it restored the note to the assignee with the same rights as though Tilden & Breed had never attempted to pledge it to Sime & Co. But in the meantime, Sime & Co had disposed of the stocks and converted the proceeds to their own use. In whom was the right of action for the conversion? Was it in King, or in the assignee of Tilden & Breed as the holder of King's note, and as pledgee of the stocks to secure its payment? In *Treadwell* v. *Davis*, 34 Cal. 606, we had occasion to consider the question, whether the pledgee, in an action against a stranger for a conversion of the pledge, was entitled to recover the value of the pledge, or only the value of his special interest in it. We say, "the rule appears to be well settled that in an action by the pledgee against a stranger for the conversion of goods, the plaintiff is entitled to recover the full value of the goods, because he is answerable over to the pledgor for the surplus. But if the goods be converted by the owner, or by any one acting in privity with him, the pledgee can recover

only the value of his special interest in the pledge"; and we cite in support of this proposition, Story on Bailment, Sec. 352; *Lyle* v. *Barber*, 5 Bin. 457; *Heyden & Smith's Case*, 6 Coke, 486; *Ingersoll* v. *Van Bokkelin*, 7 Cow. 670; *Pomeroy* v. *Smith*, 17 Pick. 85, to which many other authorities might be added. Assuming this to be the correct rule (of which we have no doubt), the assignee of Tilden & Breed, as pledgee of the stocks, was entitled to recover their full value from Sime & Co., who, on the plaintiff's theory, were strangers to King, and not acting in privity with him. The complaint charges them to be naked wrong doers, who wrongfully and fraudulently obtained possession of the stocks, without the knowledge or consent either of King or Tilden & Breed; and the plaintiff now contends that they wrongfully and unlawfully obtained possession of the stocks, and converted them to their own use, with full notice of King's rights. If this be so, they were wrong doers, and could not have acted in privity with King. In an action against them, the assignee of Tilden & Breed, as pledgee of the stocks, was therefore entitled to recover their full value, as he appears to have done. The effect of this recovery and the satisfaction of it by Sime & Co., was to vest in them a title to the stocks or their proceeds. In any event, it can not be doubted that the assignee of Tilden & Breed, as pledgee of the stocks, was entitled to recover the value of his special interest in them; and it appears that the stocks, at the time of their conversion, were worth much less than the debt for which they were pledged to Tilden & Breed. This value was ascertained by the judgment of the court, and was paid by Sime & Co., to the assignee of Tilden & Breed. No interest was left in King on which he or his assignee could maintain an action against Sime & Co. The point is made that the proceedings in the Bankruptcy Court were not admissible in evidence under the pleadings; but we are of a contrary opinion.

The petition for a rehearing is denied.

Mr. Justice MCKINSTRY did not express an opinion on the application for a rehearing.

Mr. Chief Justice WALLACE, being disqualified, did not participate in the decision of this case.

1. Deposit of gold dust with inn keeper: *Mateer* v. *Brown*, 1 Cal. 221, 231; *Post* GOLD DUST; *Pinkerton* v. *Woodward*, 33 Cal. 600.

2. Larceny of gold dust from gratuitous bailee: *Fay* v. *Steamer New World*, 1 Cal. 348; *Post* COMMON CARRIER.

3. Ratification of sale of pledged stock: *Child* v. *Hugg*, 41 Cal. 519; *Post* STOCK.

4. Conversion by bailee: *Atkins* v. *Gamble*, 42 Cal. 86; *Post* STOCK.

WYRLEY AND ESSINGTON CANAL CO. v. BRADLEY ET AL.

(7 East, 368. King's Bench, 1806.)

Barriers not required to support canal or prevent drainage therefrom. A canal company having the privilege of purchasing the subjacent minerals under act of Parliament can not hold the owner of the minerals responsible in damages for injuries occasioned by his mining for them upon the refusal of the company to purchase under the act, even though the working may cause the surface to subside. *Aliter* where the house of one claiming under a grant from the owner of the soil is undermined.

The plaintiffs declared that they were possessed of a certain close in the parish of Walsall, in the county of Stafford, and were proprietors and lawfully possessed of and entitled to the use, benefit, and profits of a certain canal, dug and made in, through, and over the said close, and containing water on which boats, etc., were navigated, to the profit of the company. That the defendants were possessed of a coal mine, near to, and under the said close of the company, and near to and under the said canal; yet that the defendants, well knowing the premises, but intending to deprive the company of their profits of the navigation, etc., so wrongfully, negligently, incautiously, and improvidently cut and dug their coal mine, and worked the same so near the said close of the company, and to the sides, banks, and bottom of the canal, and removed such large quantities of coal and soil from out of the said coal mine, and so near to the sides, etc., of the canal, that 300 yards of the sides, banks and bottom of the canal sunk, gave way, and were damaged and destroyed, and great quantities of water ran out of the canal and were wasted, and the canal was rendered impassable for boats, etc., for six months, and became of no use or benefit to the company, by means of which the company was obliged to expend £500 in repairs, etc. Plea not guilty.

The Stat. 32, Geo. 3, c. 80, for making and maintaining this canal, provides (s. 6.) "That nothing in this act contained shall entitle the company, on purchasing any lands for making the canal, to any mines of coal, etc., which shall be found in cutting, or shall be under the same, but that all such mines

shall belong to such persons as would have been entitled to the same in case this act had not been made." Sections 58, 59, 60 and 61, specify the method to be observed in working the mines within ten yards distance of the canal; and in particular, s. 61, enacts, "that when and as often as the owner of any mine of coal, etc., lying under or within the distance before limited from the said canal, shall be desirous of working the same, such owner shall give notice in writing under his hand of such intention to the clerk of the company, at least three calendar months before he shall begin to work such mine; and upon the receipt of such notice it shall be lawful for the company to inspect such mine, in order to determine what coal, etc., may be gotten without prejudice or damage to the canal; and if the company shall refuse or neglect to inspect such mine within thirty-one days after notice, it shall be lawful for the owner of such mine, and he is hereby authorized to work such part of the said mine as lies under the canal, or within the distance aforesaid; and if upon such inspection as aforesaid the company shall refuse to permit the owner of such mine to work such part thereof as lies under the said canal, or within the said distance, as they might have gotten, or in any other manner obstruct or prevent such owner from getting the same, then the company shall, within three calendar months after such refusal or obstruction pay to such owner such price for the same as the next adjoining mines shall have been sold for or valued at; and if any dispute shall arise between the company and any such owner touching the same, it shall be settled by commissioners," etc.

At the trial before LAWRENCE, J., at the last Stafford assizes, it appeared in evidence that the defendants, before they began to work their mine within the given distance of the canal, had given notice of their intention to the company, who, after sending persons to examine the same, declined purchasing out the defendants' rights, and left them to go on with their works, in consequence of which the defendants continued working on the mine in the usual way, till the damage happened by a partial giving way of the sides and bottom of the canal. But the learned judge, being of opinion upon the construction of the act of parliament, that the legislature had left to the owners of the lands the entire dominion and benefit of

their property in every respect not otherwise expressly provided for, and that the defendants had done everything which they were required to do by the act, and that it was the company's own fault, if upon the notice received they did not choose to purchase out the defendants' rights, he nonsuited the plaintiffs.

DAUNCEY now moved to set aside the nonsuit, and have a new trial, on the ground that the defendants were bound so to use their own as not to injure the plaintiffs' property. That the 61st section did not authorize the owners of mines near the canal to work at all hazards, though the company refused to purchase, but only left them as in other cases, to work at their own discretion and peril. And he mentioned a case which some time before had been tried by the same learned judge, between the Birmingham Canal Company and Hawkesford and others, where, under similar circumstances, though upon a different act of parliament,* the company had obtained a verdict. And he also referred to a case some years ago, where the owner of a house near Newcastle, which was undermined by a colliery of the late Lord Lonsdale, and fell down in consequence of it, recovered damages against him.

LAWRENCE, J., said he had no distinct recollection of the former case before him; but if the act of parliament in that case were not very differently framed from the present, he thought his former opinion not so well founded as in the present case. And *all the court*, after consultation, were now of opinion that the meaning of the act of parliament in requiring the coal owners to give notice to the company of their intention to work their mines within a certain distance of the canal, and the liberty given to the company to inspect the works, and to prohibit the owners upon making compensation to them from working within that distance was for the pur-

* *Note.* The clause in the Birmingham canal act, 23 G. 3 c. 92 s. 99, touching the manner of working the adjoining mines, is materially different from the clause in question. After providing that nothing in the act shall extend to defeat, prejudice, and affect the rights of any lords of manors, commons, or waste grounds, or the owners of any lands, etc., through which the canal shall be cut to the mines, etc., lying within or under the same, but all such mines are reserved to such lords and owners to work the same, etc., there follows, "*provided that in working such mines, etc., no injury be done to the said navigation.*"

pose of enabling the company to purchase out the rights of the coal owners, if they thought their canal works likely to be endangered by the nearer approach of the miners; but if the company declined to purchase, as they had done in this case, the coal owners were left to their common law rights, as if no canal had been made, and they might take every part of their coal in the same manner as they might have done before the act passed; their former rights in that respect not having been taken away by the act, which had only appropriated the surface of the land and so much of the soil as was necessary for the cutting and making of the canal, leaving the coal, etc., to the owners to be enjoyed in the same manner as before; and the legislature had only given the land owners a compensation for so much of the soil as they had deprived them of. And this they said was not like the case where damages were recovered against the late Earl of Lonsdale for undermining a person's house; for there the party claimed under a grant from the owner of the land, and the injury done was against the land owner's own grant.

Rule refused.

MEXBOROUGH v. BOWER.

(7 Beavan, 127. The Rolls Court, 1843.)

Injunction, prohibitory in form, mandatory in effect. Tenant of a mine covenanted to leave barriers, which covenant he broke and opened access to other coal grounds. He was, on motion, restrained from permitting the communication complained of to continue open, the effect intended being to compel him to close the communication made, where he should have erected barriers, and to restrain drainage.

Arbitration clauses in deeds are not binding on the parties, so as to oust the jurisdiction of the court.

This was an application for an injunction to restrain the defendants, who were the lessees of the plaintiffs' coal mine, from acting in contravention of the covenants contained in their lease.

In February, 1839, the plaintiffs granted to the defendants a lease of a coal mine in the county of York at a rent of £520, with a proportionable increased rent for all coal worked beyond two acres annually. The defendants, amongst other things, covenanted not to permit any of the brick clay to be carried off the land; to work the seam in a fair and workmanlike manner; to leave proper and sufficient barriers in the said seam or bed of coal against all adjoining collieries; to prevent the draining or laying dry any such other mines, seams or beds; and the defendants further covenanted not to work, get or raise up from the pits or shafts to be sunk and made by them, or carry over the demised premises any coal belonging to other proprietors, without the consent in writing of the plaintiffs.

The lease contained a proviso that, if any dispute, doubt or question, should arise between the plaintiffs and the defendants, either on the construction of the lease or respecting any matter or thing whatsoever, arising out of or connected with the demise or lease, or any of the covenants, conditions, stipulations, and provisions thereinbefore contained, then every such dispute, doubt, or question should be referred to the arbitration of two indifferent persons, one to be named by each party in dispute. And it was thereby further agreed, that their submission to reference might be made a rule of her Majesty's Court of Queen's Bench. And it was thereby further agreed that no suit at law or in equity should be commenced or instituted by either of the parties in dispute against the other of them, touching the matters in dispute, before the parties to be made defendants to such suit or suits should have refused or neglected to refer the matters in difference respectively, or unless the time limited for making such award or determination should have expired, without any such award or determination having been made.

The bill, the material allegations of which were verified, alleged, that in December, 1842, the plaintiffs' agents discovered, as the fact was, that the defendants had not left proper and sufficient barriers in the seam or bed of coal, and that they had made a communication or road in the bed of coal into an adjoining coal field, the property of Sir John Lowther; that they had commenced working the coal of Sir John Lowther, and had worked, gotten, or raised up from the pits or shafts

sunk by them on the property comprised in the aforesaid indenture, and had also carried over the premises comprised in the aforesaid indenture coal belonging to Sir John Lowther; that the defendants by means of the aforesaid communication, conducted the water from the seam of coal of Sir John Lowther, into the seam of coal demised to the defendants by the aforesaid indenture, and that they raised the same by means of the said pits or shafts; that the defendants had thereby drained or laid dry the mines, seams, or beds of coal on the property of Sir John Lowther, and had conveyed the coal gotten by them from the property of Sir John Lowther along the railway and staith on the premises comprised in the aforesaid indenture. The bill also alleged that the defendants had made bricks and tiles on the property, which they had carried off the premises.

The plaintiffs now moved for an injunction to restrain the defendants from carrying the brick clay, or bricks or tiles made thereof, off the land; from working away sufficient barriers in the seam in the parts adjoining; from making a communication into adjoining collieries, and from draining any other mines, or permitting the same to be drained, by means of the demised colliery; *and from permitting the communication complained of to continue open*, and from permitting any water to flow through the same into the demised colliery, and from raising, by means of the shafts on the demised premises, any coal of any other proprietor, and from carrying the same over the demised premises; and from doing, etc., any act, etc., in breach of the covenants in the lease.

The affidavit in support of the motion verified the statements in the bill, and also stated that, by erecting proper dams or barriers, the said communication might be blocked up, and the water prevented flowing from the said property of Sir J. Lowther into the bed or seam of coal comprised in the aforesaid indenture.

The affidavits in opposition stated that there was a fall or dip from the plaintiffs' collieries to those of Sir John Lowther; that consequently all the water necessarily flowed toward Sir John Lowther's coal, and not toward the bed or seam of coal demised by the plaintiffs to the defendants; and that the

effect of the communication would be to materially benefit and improve the property and mines of the plaintiffs and diminish the expense of working the same.

Mr. PEMBERTON LEIGH and Mr. BATES in support of the motion.

Mr. KINDERSLEY and Mr. WRIGHT, *contra*.

Waters v. *Taylor*, 15 Ves. 10; *Lingood* v. *Croucher*, 2 Atk. 395; *Mitchell* v. *Harris*, 2 Ves. Jr. 131, were cited.

The MASTER OF THE ROLLS:

The only question in this case is as to the form and the extent of the injunction to be granted.

From the course of the argument, one would really think that some doubt had arisen as to the jurisdiction of the court to compel parties to perform their covenants and agreements, and that the jurisdiction of this court to prevent parties from willfully and avowedly violating contracts deliberately entered into, had become perfectly unnecessary.

What are the facts? A lease of a coal mine was granted by the plaintiffs; certain covenants required by one party were entered into, and agreed to by the other, and constituted a portion of the consideration upon which the contract was founded. It is now plainly admitted by the defendants that they have acted in direct violation of those covenants, and, an application being made to this court to prevent that violation being continued, it is said, in answer by the defendants, "We have indeed violated the covenants, but we have not done it in a way prejudicial to you; on the contrary, according to our judgment and the view we take of your case, this is a very profitable and beneficial proceeding for you, and you must abide by our judgment." It is sufficient to say, that the plaintiffs have a right to insist on their own view of their own interests, and that even if it should be as beneficial to them, as has been argued on the other side, they may nevertheless choose to insist on having the terms of the contract strictly obeyed.

Next it is said, "You had notice of this long before you filed your bill; a treaty for compensation took place after

were aware of it, and if the proposed compensation had satisfied you, you would never have complained of this violation." It is possible that the parties who stipulated for the benefit of these covenants would have waived them, and they might have entered into a treaty for the purpose of considering whether such a compensation in damages would be made, as would have induced them to waive the agreement. But here the case is otherwise; they were not satisfied, and they therefore demand the strict performance of the contract.

With regard to the length of time, nothing can be more true than this,—if parties come and ask for an injunction *ex parte*, the court looks most minutely to the time in which they have permitted the matter complained of to proceed, and will not allow them to obtain an injunction in the absence of the other party, when they have themselves, for some time, acquiesced. It is quite reasonable that that should be so, because the granting of an injunction *ex parte* is the exercise of a very extraordinary jurisdiction, the effect of which, in every case in which it is asked, is almost alarming; therefore the time at which the plaintiff first had notice of the existence of the subject of complaint is looked to with the greatest care and jealousy, in order to prevent an improper order being made against a party in his absence; but when the party has notice of the motion, the question then is entirely of a different kind. The question then is, whether, during the time which has elapsed, there has been a course of conduct from which a waiver of the terms or an acquiescence in the violation of the contract is to be inferred. That is quite another thing, and there is nothing at all like it in this case.

The next thing said is, "You have accepted a compensation for increased work, and a sum of money has been paid now in respect of it;" but the answer is, that there is, in other respects, a continued violation of the covenants, and no acquiescence in the violation.

The remaining argument is, that the deed contains a clause for a reference to arbitration. Now, there are a great number of cases in which, from the difficulty of ascertaining the truth and the great complication of the rights and interests involved, it is almost impossible for the court to do strict justice between parties within such limits of time and ex-

pense as are in any degree proportionate to the value of the interests in question. Many cases occur in which it is perfectly clear that, by means of a reference to arbitration, the real interests of the parties will be much better satisfied than they could be by any litigation in a court of justice. In these cases the court has shown itself very anxious that matters of this kind should be determined in a way most beneficial to the parties, and much more so, when it finds that the parties, anticipating difficulties of that kind, have provided for their settlement by arbitration. It has, however, been decided that these clauses for a reference are not binding upon the parties, who can not contract themselves out of their right to have their disputes settled in courts of justice. Notwithstanding the many cases in which a reference to arbitration may justly be preferred to prolonged litigation in court, cases without end arise, in which, by no possibility, could arbitrators do that justice which the powers of courts of justice enable them to administer. Cases arise which were not in the contemplation of the parties when they entered into their agreement. It has under these circumstances been, I think, justly held that arbitration clauses are not to be enforced against the parties, and I find nothing in the wording of these particular clauses which at all alters this case.

Upon none of these grounds do I think the plaintiffs have, in any way, disentitled themselves to the protection of this court, or to their right to insist in this court that the covenants which they have contracted for shall from day to day be obeyed by the defendants. Nevertheless, it is very important to consider what the terms of the injunction are to be; I do not think it ought to extend beyond the violations which have taken place; it ought not to be expressed in such general terms as may imply that the defendants intend to violate those covenants which they have hitherto respected. This motion asks for something more than ordinary: namely, to restrain the defendants permitting water to flow through the communication. It is, however, no unusual thing to ask an injunction in this form; I think it was granted in the case of *Robinson* v. *Lord Byron*, 1 B. C. C. 588 (see *Blakemore* v. *The Glamorganshire Canal Company*, 1 M. & K. 154;

Milligan v. *Mitchell*, Ib. 452; *Lane* v. *Newdigate*, 10 Ves. 192; *Nutbrown* v. *Thornton*, Ib. 159; *Rankin* v. *Huskisson*, 4 Sim. 13; *Taylor* v. *Davis*, 3 Beav. 388, n. *a*.; *Spencer* v. *The London and Birmingham Railway Company*, 8 Sim. 193; *Squire* v. *Campbell*, 1 Myl. & Cr. 465, 467; *Whittaker* v. *Howe*, 3 Beav. 387; and 395, n.; *The Great North of England etc., Railway* v. *The Clarence Railway*, 1 Collyer, 507), and in other cases. Indeed, I believe that in another branch of the court, some few years ago, a direct order was made for the party to do that which was required to put an end to the violation of covenants; I do not, however, know whether that has been since acted upon, and I do not mean to deviate from the regular and established practice. The injunction, therefore, must be confined to those things in respect of which at this time and upon the evidence before me, it appears that the plaintiffs require protection, and it should not extend to the last general words; this court never, without necessity, presumes there will be a violation of the covenants.

The injunction was granted in the terms of the notice of motion, omitting the last clause. The order was affirmed on appeal, 9th December, 1843.

MARKER v. KENRICK.

(13 Common Bench, 187. Common Pleas, 1853.)

Case against lessee for removing barriers. Case, in the nature of waste, will lie against a lessee of a mine for an injury to the reversion by the removal of coal barriers between it and an adjoining mine, although the act complained of might also be the subject of an action for a breach of an express covenant.

This was an action upon the case in the nature of waste. The declaration stated that, before and at the times of the committing of the grievances thereinafter mentioned, the defendant was tenant to the plaintiff of divers beds, veins, seams and mines of coal, cannel, slack, ironstone and other minerals, with the appurtenances, in the parish of Ruabon, in the county of

Denbigh, for a certain term of years, the reversion of, and in the same beds, veins, seams and mines of coal, cannel, slack, and ironstone, and other minerals respectively, then and still belonging to the plaintiff; and it was the duty of the defendant, as such tenant, to work and manage the said beds, veins, seams and mines, in a proper and tenantlike manner; yet the defendant, well knowing the premises, but contriving and intending to injure and aggrieve the plaintiff in his reversionary estate and interest of and in the said beds, veins, seams, and mines, theretofore, and whilst he, the defendant, was tenant thereof as aforesaid, and whilst the plaintiff was so interested therein, as aforesaid, to wit, on the 1st of June, 1850, and on divers other days and times between that day and the commencement of this suit, worked and managed the said beds, veins, seams, and mines in an improper and untenantlike manner, and then, to wit, on the several days and times aforesaid, wrongfully and unjustly, without the leave or license, and against the will of the plaintiff, cut, made, dug, bored, and broke through a certain barrier, to wit: of coal, which formed, and ought to have been left as the boundary between the said mines of the plaintiff, and a certain other mine adjoining thereto, and thereby then caused and permitted large quantities of water to escape, run and flow from the said other mine into the said mines of the plaintiff, and to flood the same; and then also, to wit: on the several days and times aforesaid, wrongfully and injuriously made, and caused and procured to be made, certain roads, ways, passages, and communications between the said mines of the plaintiff and the said other mine, and by and through the said roads, ways, passages and communications, carried and brought divers large quantities of coal gotten from the said other mine, into, upon, and through the said mines of the plaintiff, and brought into, and laid and deposited upon, the said mines of the plaintiff, divers large quantities of earth, soil, and rubbish, and kept the same so deposited thereon, to wit: from thence hitherto; and, by the means and in the manner aforesaid, rendered the said mines of the plaintiff less workable than they would otherwise have been; by reason of which premises respectively the said beds, veins, seams, and mines of the plaintiff were, and are greatly injured and deteriorated in value

rendered less productive and profitable than the same might and otherwise would have been; and the plaintiff had been and was greatly injured, prejudiced and aggrieved in his said reversionary estate, and interest therein, etc.

Pleas—first, not guilty—secondly, that one Edward Lloyd Kenyon, before and at the time of the making of the indenture hereinafter next mentioned, was seized in his demesne as of fee of and in the tenements and premises, with the appurtenances hereinafter mentioned to have been demised, and, being so seized, heretofore, and before the committing of any of the grievances in the declaration mentioned, to wit: on the 24th of June, 1840, by a certain indenture then made between the said Edward Lloyd Kenyon of the one part, and Edward Evans, Gomer Roberts, Evan Hughes, and Evan Jones, of the other part, which indenture, sealed with the seals of the said several parties thereto respectively, being in the possession of the plaintiff, the defendant can not produce the same to the court, etc.—the said Edward Lloyd Kenyon did demise, lease, set, and to farm let unto the said Edward Evans, Gomer Roberts, Evan Hughes, and Evan Jones, their executors, administrators and assigns, all and every the said beds, veins, seams, and mines of coal, cannel, slack, ironstone, and minerals, in the declaration mentioned, with full liberty and power for the said Edward Evans, Gomer Roberts, Evan Hughes, Evan Jones, their executors, administrators, and assigns, servants, and workmen, to enter upon the said lands and grounds, and to make and sink such pits or shafts therein for the getting and raising of coal, cannel, slack, and ironstone, and to set up, drive, cut, dig, build, erect, and make, in and through any part or parts of the said premises (except within ten yards under the dwelling house and out buildings thereon), such roads, water-courses, drains, levels, whimseys, and engines, and other devices, as should be necessary or convenient for the carrying on the said works, and draining the same, and to do such other acts, matters and things, as in the said indenture are more particularly mentioned and described (except as in the said indenture is excepted); to have, hold, use, exercise, and enjoy the said premises, with the appurtenances, so demised as aforesaid, unto the said Edward Evans, Gomer Roberts, Evan Hughes, and Evan Jones, their executors, adminis-

trators, and assigns, from the said 24th of June, 1840, for and during, and unto the full end and term of twenty-one years then next ensuing; yielding, paying, and delivering unto the said Edward Lloyd Kenyon, the rents, royalties, rates, farms and duties in the said indenture particularly mentioned and set forth: And the said Edward Evans, Gomer Roberts, Evan Hughes, and Evan Jones, did, in and by the said indenture, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant, promise, and agree, with and to the said Edward Lloyd Kenyon, his heirs and assigns (amongst other things), in manner following, that is to say, that they, the said Edward Evans, Gomer Roberts, Evan Hughes, and Evan Jones, their executors, administrators and assigns, should and would at all times during the said demise, by and with a sufficient number of workmen, carefully and diligently use their best endeavors to find out and discover all such mines, beds and veins of coal, cannel, slack and ironstone, as could or might be found in or under the said premises by the said indenture demised and should and would at all times during the continuance of the said term constantly carry on and effectually work the said beds, veins, seams and mines so demised as aforesaid, in a fair and husbandlike manner, with a sufficient number of experienced and able miners, colliers and laborers, not fewer than twelve at any time, provided the coal, cannel, slack and ironstone that should be from time to time gotten and raised could be disposed of for profit; and also should and would keep open one pit at least constantly and effectually during the said term, unless prevented by waters or other inevitable accidents; and also should and would make such water-courses, drains, levels, engines, whimseys and other devices as should from time to time be necessary and convenient for effectually carrying on and draining the said works; and the said Edward Lloyd Kenyon did thereby, for himself, his heirs, executors and administrators, covenant, promise and agree with and to the said Edward Evans, Gomer Roberts, Evan Hughes and Evan Jones, their executors, administrators and assigns that they, the said Edward Evans, Gomer Roberts, Evan Hughes and Evan Jones, their executors and administrators should and might, under the reservations, forms, covenants, payments r

ments thereinbefore mentioned, peaceably and quietly possess and enjoy all and singular the thereinbefore demised premises, privileges and powers during the term thereby granted, without any let, suit, hinderance or interruption of or by the said Edward Lloyd Kenyon, his heirs or assigns, or any other person or persons whomsoever claiming under him or them in anywise—as by the said indenture, reference being thereto had, will more fully and at large appear. That, by virtue of the said demise, the said Edward Evans, Gomer Roberts, Evan Hughes and Evan Jones, afterward, to wit, on the day and year aforesaid entered into and upon all and singular the said demised premises, with the appurtenances, and became and were possessed thereof for the said term so to them thereof granted as aforesaid. That, after the making of the said indenture and during the said term thereby granted and before the committing of any of the said supposed grievances, to wit, on the 20th of January, 1845, by a certain deed of assignment then made between the said Edward Evans, Gomer Roberts, Evan Hughes and Evan Jones of the first part, the plaintiff of the second part, and the defendant of the third part,—profert,—they the said Edward Evans, Gomer Roberts, Evan Hughes, and Evan Jones assigned, transferred and set over to the defendant all and singular the said mines, tenements and premises so demised to them as aforesaid, with the appurtenances, to have and to hold the same unto the defendant, thenceforth for and during all the residue and remainder then to come and unexpired of the said term of twenty-one years so demised to the said Edward Evans, Gomer Roberts, Evan Hughes and Evan Jones as aforesaid, subject to the payment of the rents and royalties and to the due observance and performance of the covenants, agreements, clauses, conditions, matters and things in the said indenture of lease reserved and contained, from and after the date of the said deed of assignment.

That thereupon and thereby the defendant entered into and upon all and singular the said demised and assigned premises, with the appurtenances, and became and was, and still is, possessed thereof, the said term of twenty-one years being still current. That the said Edward Lloyd Kenyon, after the making of the said first-mentioned indenture, to wit, on the 12th

of August, 1842, duly made and published his last will and testament in writing, etc., and thereby, amongst other things, gave and devised the said demised premises, with the appurtenances, to the plaintiff and the Hon. Lloyd Kenyon, their heirs, executors, administrators and assigns, to hold unto and to the use of the plaintiff and the said Lloyd Kenyon, their heirs and assigns forever. That the said Edward Lloyd Kenyon, afterward, and before the committing of any of the said grievances, to wit, on the first of September, 1842, died so seized of the reversion of and in the said demised premises, with the appurtenances, as aforesaid, without altering his said will as to the said bequest of the said demised premises, with the appurtenances. That the said Lloyd Kenyon, afterward and before any of the said supposed grievances were committed, to wit, on the 7th of August, 1843, by a deed-poll, under his hand and seal, bearing date the day and year last aforesaid, amongst other things, disclaimed and renounced the devise so made to him as aforesaid; whereupon and whereby the plaintiff then and immediately from and after the death of the said Edward Lloyd Kenyon became and was solely seized in his demesne as of fee in the said reversion, being the same reversion in the declaration mentioned, and thereby upon the assignment of the said premises to the defendant, and by reason thereof, he, the defendant, became and was tenant thereof to the plaintiff as in the declaration mentioned, and so remained and continued until the commencement of this suit. That the defendant never was tenant to the plaintiff otherwise than as aforesaid, nor was the plaintiff entitled to the said reversion in the declaration mentioned otherwise than as aforesaid. That the supposed grievances in the declaration mentioned were, and each of them was, committed after the said assignment of the said premises to the defendant as aforesaid, and after the plaintiff became so entitled to the said reversion as aforesaid. And that the alleged grievances in the declaration mentioned were and constituted, and each of them was and consisted of a carrying on, managing, and working of the said demised mines, veins, seams, and beds of coal and minerals, in a particular manner; and that the manner of carrying on, managing, and working the same was and is provided for by the said covenants in the said first-mentioned indenture in that behalf contained as aforesaid, which still remain in full force—verification.

The plaintiff took issue on the first plea, and demurred to the second—the point marked in the margin of the demurrer being as follows: "One of the grounds of demurrer is, that the grievances as disclosed by the declaration, are not mere breaches of the covenants in the lease mentioned in the plea, or any of them, but are grievances in the nature of waste or destruction of the thing demised, for which an action on the case will lie, notwithstanding the lease."

The defendant joined in demurrer.

LUSH (HONEYMAN was with him), in support of the demurrer: (The point marked for argument on the part of the plaintiff, was, "The plaintiff will contend that the destruction of the boundary, and the other wrongs alleged in the declaration, are in the nature of waste, and that an action on the case is maintainable for these, notwithstanding the lease.")

The defendant will contend that *case* is not the appropriate remedy for the wrong complained of, but that the plaintiff should have sued in *covenant*. The chief grievance complained of is, the cutting away the barrier which formed the boundary between the mines of the plaintiff and the adjoining mine. That clearly would have been the subject of an action if there had been no covenant.

[CRESWELL, J.—Are you not confounding barrier and boundary? They are not necessarily the same.] In this case they mean the same thing. The authorities are clear, that case will lie for an injury of this kind, even though it might also be made the subject of an action upon the covenant. Thus, in *Kinlyside* v. *Thornton*, 2 W. Blac. 1111, it was held that case in the nature of waste will lie against a tenant for years after the expiration of his term, as well as covenant for the breach of those contained in his lease. And DE GREY, C. J., said: "I have no difficulty upon this question. Tenant for years commits waste and delivers up the place wasted to the landlord. Had there been no deed of covenant, the action of waste, or case in nature of waste, would have lain. Because the landlord, by a special covenant, acquires a new remedy, does he therefore lose his old?" See *Jones* v. *Hill*, 1 J. B. Moore, 100 (E. C. L. R. Vol. 17), 7 Taunt. 392 (E. C. L. R. Vol. 2). The authority of that case has been frequently recognized. In

Muskett v. *Hill*, 5 Bing. N. C. 694, 7 Scott, 855, the assignee of a license to mine brought *case* against the grantors for obstructing him in the exercise of his right, under color of an informal re-entry for condition broken; and TINDAL, C. J., in delivering judgment, said: "Another point was incidentally suggested on behalf of the defendants, though not much insisted upon, that an action on the case, under the circumstances, was not maintainable, but that the action should have been an action of covenant or an action of trespass. It is not material to inquire whether in this case an action of covenant could have been maintained; for, assuming that it might, it would not follow from thence that an action on the case might not also lie. On the contrary, it has been decided that a party may, in some cases, have his election, and bring either covenant or case: See *Kinlyside* v. *Thornton*. And in the present case, the interest granted being assignable, the assignee has a right to enter on the land and exercise his license; and, if the owner of the soil prevents him, it is a wrong, for which an action on the case will lie, on the established principle of our law, that, in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages, Com. Dig. *Action on the case*, (*A*)."

[MAULE, J.—You liken this to the case of a lessee covenanting not to commit waste?] Yes; *Bowman* v. *Brown*, 3 Q. B. 511 (E. C. L. R. Vol. 43), 2 Gale & D. 793, lays down the same doctrine; and the same principle is shown in the cases as to carriers and attorneys. See the authorities collected in 2 Wms. Saund. 252 b, 252 c.

Case clearly would have lain if there had been no express covenant; and the existence of the covenant does not deprive the plaintiff of that form of remedy. Besides, the covenants in the lease of the 24th of June, 1840, do not reach the complaint. The acts here complained of are not within the purview of the covenant at all; that which the plaintiff charges, is the destruction of the subject-matter of the covenant itself.

[MAULE, J.—The covenant is, to do something; not in the negative.]

J. BROWN (with whom was WELSBY), *contra.* (The points marked for argument on the part of the defendant, were—"1. That there being express covenants in the lease, as to the mode of working the collieries, etc., demised, no action on the case will lie for working them in the particular way complained of; but an action of covenant should have been brought. 2. That the rule '*Expressum facit cessare tacitum*' applies. 3. That if the acts complained of constituted breaches of covenant, an action of covenant should have been brought; and, if they were not breaches of covenant, then they are not actionable at all, as the lease provides for the mode of working the mines.") "*Modus et conventio vincunt legem.*"

Wherever there is an express contract between the parties, any contract implied by law, and the rights and remedies of either party thereon, are suspended: *Schlencker* v. *Moxsy*, 3 B. & C. 789 (E. C. L. R. vol. 10), 5 D. & R. 747 (E. C. L. R. vol. 16). There the tenant of certain premises underlet a part *by deed*, and the original landlord distrained for rent upon the undertenant; and it was held that assumpsit would not lie by the latter against his lessor, upon an implied promise to indemnify him against the rent payable to the superior landlord; and the court said: "The parties made an express contract by deed. That excludes any implied contract. If the plaintiffs were interrupted in the quiet enjoyment of the premises, covenant would lie on the demise: Com. Dig. *Covenant*, (A. 4)." So, in *Baber* v. *Harris*, 9 Ad. & E. 532 (E. C. L. R. vol. 36), 1 P. & D. 360, it was held, that, where a lessee assigns and grants over his lease *by deed*, not containing a covenant for quiet enjoyment, or for indemnity against demands of rent due to the superior landlord before assignment, the assignee, if distrained upon for such rent, may bring an action of covenant against the assignor, founded on the word "grant" in the deed. Lord Denman there says: "The only question in this case is, whether, under the circumstances, an action of covenant could be maintained upon the indenture of assignment from the defendant to the plaintiff; for, *if it could, no action of assumpsit upon an implied promise to indemnify will lie.* This doctrine is clearly established in many cases; amongst others, in *Bulstrode* v. *Gilburn*,

2 Stra. 1027, *Toussaint* v. *Martinnant*, 2 T. R. 100, and *Schlencker* v. *Moxsy*." In the books of precedents, all these cases against tenants for improper management of farms, etc., against carriers and attorneys for negligence and the like, are classed indifferently among actions of assumpsit and case. Where assumpsit—which originally was only one form of an action upon the case—will not lie, by reason of the existence of an express contract under seal, case will not lie. [MAULE, J.—If there had been no contract under seal here, the plaintiff no doubt might have brought either assumpsit or case. Does it not follow that, the contract being under seal, the plaintiff has the option to bring case or covenant?] By no means. The doctrine of *Kinlyside* v. *Thornton*, has been very much modified in the later cases. In *Edwards* v. *Bates*, 7 M. & G. 590 (E. C. L. R. vol. 49), 8 Scott, N. R. 406, CRESSWELL, J., lays it down that, where there is a contract between two parties under seal, the one can not sue the other as upon a simple contract, in respect of the subject-matter of the specialty contract. Further, it is submitted that no action at all will lie in respect of the grievance here complained of, if covenant will not. If the defendant has not broken his covenant he has committed no wrong.

JERVIS, C. J.—I am of opinion that the plaintiff is entitled to judgment. The case of *Kinlyside* v. *Thornton* decided expressly that a lessor may sue for waste in an action upon the case although the lease contains a covenant upon which the lessor might maintain an action for the same wrong. It is unnecessary to go into the refinements suggested by Mr. BROWN. *Kinlyside* v. *Thornton* decides the question.

MAULE, J.—I am of the same opinion. *Kinlyside* v. *Thornton* shows, that, if waste be committed, as is the case hear, the lessor may maintain an action on the case for it, and that it is no answer for the lessee to say that covenant also may be maintained. That case shows that the lessor may have either remedy. The authorities which are said to have shaken that case seem to me to have nothing to do with the matter. All they decide is, that, where there is a contract under seal, you can not sue in respect of the *same* contract, as upon a contract not under seal.

CRESSWELL, J.—I am quite of the same opinion. *Kinlyside* v. *Thornton* is precisely in point, and I think it has not been affected by any subsequent decision.

WILLIAMS, J.—I am of the same opinion. *Kinlyside* v. *Thornton* was expressly recognized in *Muskett* v. *Hill;* and Mr. BROWN admits that it is decisive of the question, if not overruled, which I can not find that it has been.

Judgment for the plaintiff.

BANNON v. MITCHELL.

(6 Illinois Appeals, 17. Appellate Court, 1880.)

Right of action in both lessor and lessee. When an injury is done to premises while a party has a leasehold interest therein, the holder of such interest has a right of action for such portion of the damages as he has sustained, and the owner of the reversionary interest has also a right of action for his damages.

Flooding from removal of barriers. Where the defendant in mining coal, passed over the line of his land upon that of the plaintiff and removed therefrom a quantity of coal left in its natural state as a barrier, and in consequence of such removal, the water from defendant's mine flowed into plaintiff's mine in such quantities as to render further mining of coal impracticable, the plaintiff is entitled to recover substantial damages for the wrongful act of the defendant.

Appeal from the City Court of Alton; the Hon. HENRY S. BAKER, Judge, presiding. Opinion filed April 2, 1880.

BAKER, P. J.

Bannon, the plaintiff, being the owner of a tract of land containing fourteen and three fourths acres, and upon which a shaft had been sunk and a coal mine opened, demised and leased said land on the 17th day of April, 1876, to Malloy for a term of ten years, "for the purpose of mining coal," said Malloy agreeing to pay during said term the rent of one half cent per bushel for all the stone coal taken out by him during said term. Malloy covenanted in the lease to deliver up the premises at the end of the term in as good condition as they then were, reasonable use, wear and tear, fire and other

casualties excepted. He also covenanted that he would not do, or suffer to be done, any waste in the demised premises. He took possession and operated the mine until October, 1877. The defendant, Mitchell, owned and was operating a coal mine on land adjoining plaintiff's land on the west; and the coal in the two mines was of the same vein and dipped from west to east, and the coal on plaintiff's land was lower than the coal in defendant's mine.

Defendant, in mining, passed over the line of plaintiff's land and dug and removed a strip of coal under plaintiff's land one hundred and sixteen feet long and nine feet thick at one end, and running to a thickness of seventeen feet at the other end, and thereby connected his mine with the mine on plaintiff's land. Said Malloy had left this strip of coal as a barrier, to protect his mine from water from defendant's mine; and had not this strip been cut through by defendant it would have protected the mine from said water. Shortly thereafter defendant abandoned his mine, and large quantities of water accumulated therein, and the barrier being removed flooded and drowned out the mine on plaintiff's land, so that it could not be operated and had to be abandoned and was filled with water from defendant's mine. Malloy fought said water for three months and went to great expense, but without success; and was compelled to abandon the mine and coal. The flooding of plaintiff's mine by water from defendant's mine could not have in any manner been prevented or guarded against after the cutting through of said strip or barrier by defendant.

Malloy recovered judgment against defendant for $750 damages for the aforesaid expense he was at, and for the coal that had been taken from said strip by defendant; but did not recover in his suit anything by way of damages to the coal in bank in said mine.

No coal has since been mined or taken from the mine on plaintiff's land; it has been wholly impracticable to operate said mine, for the reason that the expense of operating the same would greatly exceed the value of the coal taken therefrom. Had it not been for defendant breaking into and flooding said mine, 400,000 bushels of coal could have been taken out of the same. Said coal was worth in bank at the time said mine was flooded and abandoned, the sum of one

half cent per bushel, and would still be worth that sum had not said mine been flooded as aforesaid. The foregoing are substantially the material facts in this case, as they are admitted by a demurrer to the evidence.

Malloy took by the lease, a term of ten years in the tract of land, and had a possessory right to the whole premises for that length of time. Moreover, the contract expressly gave him the right and privilege to mine coal during the term out of the mine that had already been sunk and opened on the land, he paying Bannon therefor, half a cent per bushel for all the stone coal taken out by him during the term. He did not bind himself to take out all, or any certain portion of the coal, or to pay for it all, or any fixed portion of it, a half cent per bushel, but only that he would pay for what was dug at that rate. In addition to the possessory right given, the contract was only a license or privilege to dig the coal at a stipulated price. By availing himself of this privilege, and severing the coal from the land, he would become a purchaser of it, and acquire the property in the coal so mined and severed from the freehold. Until severed, the coal remained a part of the land and freehold of the lessor. The contract, so far as regarded the mining, was executory, and it depended upon his own acts whether he would take any coal, or the lessor part with any. The property in the coal so long as it remained in the bank was still in the lessor, with a possessory right of a term of years, and a contract right to detach the coals during the term, and thereby render them his own property, in the lessee. The lease did not purport to convey the coal or any portion of the freehold. The tenant, in his suit, very properly recovered for the coals the defendant had actually mined and taken away, for these coals had been detached and severed from the freehold by the act of a stranger, and the tenant might well claim that he, having the possession of the whole premises, and the right of detaching and appropriating the coal as his own property, could take and appropriate the coal after it had been wrongfully severed by the tort feasor.

If the tenant had given defendant permission to dig the coal, he would have been bound by his contract himself to pay the lessor the stipulated price therefor; and so the defendant having dug without such permission, he could step in and take

the coals, or recover damages for their conversion, still being bound to pay his lessor such price. The defendant is liable to respond in damages to the full extent of the injury he has done. When any injury is done to premises while a party has a leasehold interest therein, the holder of such interest has a right of action for such portion of the damages as he has sustained, and the owner of the reversionary interest has also a right of action for the damage he may sustain: *McConnel* v. *Kibbe*, 33 Ill. 175; *Cooper* v. *Randall*, 59 Id. 317; *I. B. & W. R. R. Co.* v. *McLaughlin*, 77 Id. 275; *Ripka* v. *Sergeant*, 7 Watts & Serg. 9. In *Biddlesford* v. *Onslow*, 3 Levinz, 209, it was held that both lessor and lessee should sue in respect of trees injured by a stranger, the lessor for the body of the trees, the lessee in respect of the shade and fruit. Here, the tenant had a mere possessory interest, and no property in the soil, ground, or coal in bank, and no right to the soil or coal in bank beyond an inchoate and executory right to detach such coal from the freehold, and by that act make it his own property. Appellee relies greatly upon *Attersoll* v. *Stevens*, 1 Taunt. 182, and upon some statements in Sedgwick on Damages, Ch. V, which appear to be based upon that case. The case was decided by the English Court of Common Pleas in 1808, by a divided court; and we prefer the reasoning of CHAMBRE, J., in his dissenting opinion, to the views expressed by the bare majority of the court; we think it more consonant with the decisions of our own courts; and more reasonable and just as allowing each party to recover the damages that belong to himself, and from him who occasioned them. Such doctrine, also, is not liable to the abuse of allowing opportunity for fraud and collusion between the tenant and tort feasor, whereby the tenant being himself impecunious, a merely nominal or insufficient recovery might be had by him against the trespasser, and the lessor would have but a vain remedy for his wrongs upon the liability by the law imposed on the tenant, or by the tenant assumed by the covenants of his lease; and the result might be, the wrong-doer would go almost or quite scot free, although the whole of the substantial injury done by him may have been to the reversionary interest.

In the case cited, CHAMBRE, J., said: "It has been supposed in the course of the discussion in the present case, that

where there is an existing tenancy for life or years, so that an action for waste may be brought against the tenant for an injury done to the inheritance, that action is the only remedy the reversioner has, and he can maintain no action against the stranger who in fact commits the waste; but I take the law to be clearly settled otherwise, and that the reversioner may in all cases maintain an action on the case against such stranger, whether the tenancy be at will, for years or life; or he may, if he pleases, waive the penal action of waste, even against the tenant, and bring case against him." In the suit at bar, assuming plaintiff may have had a remedy upon the covenants of the lease against the tenant for the injury done by defendant to the reversion, yet no good reason is perceived why he may not, at his own election, proceed directly against the wrong-doer himself for his damages. It is urged by appellee that the privilege given the tenant by the lease of taking coal was unlimited; and that he had a right to take the coal up to Mitchell's line, and thereby connect the two mines; that water would have flowed into the mine by these lawful acts of the tenant the same as it did by the act of defendant; that the consequence in either case would have been the same; and therefore there was no injury to the reversion of which plaintiff may rightfully complain. We think the premises assumed are unsound. The tenant covenanted to deliver up the premises in good condition, and that he would not do, or suffer to be done, any waste in the demised premises: and he could not lawfully and without committing waste, have removed the strip or barrier of coal in bank that protected the mine of his lessor from being flooded and ruined. We think it evident the damages the tenant recovered in his action are not the same damages sought to be recovered in this action.

The demurrer to the evidence shows the judgment for $750 was for the expenses the tenant was put to in vainly endeavoring to remove the water from the mine, and for the coal actually severed by defendant from the freehold and taken out of the mine; and that he did not recover in said suit anything by way of damages to the coal in bank in said mine. There is nothing to indicate the damages here proceeded for were in any way involved in the action prosecuted by the tenant; and the defendant can take nothing by his plea of former recovery.

Some question is made upon the plaintiff's pleadings. The first count of the declaration, after alleging tortious act of the defendant, concludes: "Plaintiff avers that the water, in consequence of the drain or dip of the mines, as aforesaid, immediately commenced running from defendant's mine in large quantities upon plaintiff's land and into his mine, and has so continued ever since; that in consequence thereof said Malloy has been completely prevented from digging the coal out of said land, said mine has been drowned out and rendered completely worthless; that on account of such water running into plaintiff's said mine and land, the mine is constantly full of water and can not be worked, and the coal can not be taken or mined from said land and all is lost, and plaintiff's land and coal is destroyed; and he loses all the rents he would have received from said coal; to plaintiff's damage, $10,000." The second count concludes by alleging "that in consequence of drowning out said mine, he has lost all the coal under his land; that it is impossible to have the same dug out, and plaintiff has lost large rents; to his damage, $10,000." We see no substantial variance between the injury and damage stated in the declaration, and that shown by the evidence; and we do not regard the point made on the replication as substantial, or one of which advantage can be taken on this demurrer to evidence.

It is conceded that in actions of this character, it must be distinctly averred in the declaration that the act complained of has been done to the damage of the reversion, or else an injury must be stated of such nature as is necessarily injurious to the reversion. It may also be conceded, appellant can not maintain an action for the rents or royalty, for the reason it was by the terms of the lease optional with the tenant, whether he would take any coals out or not, and it was uncertain whether, in any event, plaintiff would have got this rent or royalty. But this particular statement of damages may be rejected as surplusage. This leaves the plaintiff the allegations, "the land and coal is destroyed," and that "he has lost all the coal under his land." These show a substantial injury to the reversion; for we have seen that under the contract, the property in the coal in bank did not pass to the tenant; and that such property only passed upon severance from the

freehold; and, as there never has been a severance of this coal in bank, it always has been, and still is a part and parcel of the land and reversionary interest of the lessor. If a building in possession of a tenant is destroyed by a trespasser, the landlord as reversioner, has for his damages the difference between the value of the property immediately before the harm was done, and its value in the condition produced by the injury. In this case it is claimed the coal is lost and destroyed; and the demurrer admits the mine can not be operated, and had to be abandoned, and is filled with water, and that this water can not in any manner be stopped or controlled, and could not in any manner have been prevented or guarded against after the removal of the strip or barrier of coal; and that it has continuously been wholly impracticable to operate the mine, for the reason that the expense of operating the same would greatly exceed the value of coal mined therefrom. The demurrer further admits said coal was worth in bank at the time said mine was so flooded and abandoned, the sum of a half cent per bushel, and would still be worth that sum, had not said mine been flooded; and that if it had not been for defendant's breaking into and flooding said mine, 400,000 bushels of coal could have been taken out of it. We think that for all practical purposes, this shows a substantial loss and destruction of the coal. It will not do to urge that the coal is still there, just as good and just as much of it as there was at the time of the injury complained of. If the coal is so flooded with water that it is impracticable to take it out because the expense of so doing would greatly exceed its value when taken out, then it now, in the condition in which the act of defendant has placed it, has no appreciable value, the value it had has been destroyed and lost, and the reversioner's interest in the land is thereby of less value. It is uncertain the coal ever will have any value, or give any additional value to the land; it is mere matter of speculation. If the coal had been mined and loaded on boats, and those boats were sunk in the river, or ocean, and so sunk that the cost of raising the coal would greatly exceed its value when raised, it would be idle to say the coal was not lost or destroyed, but was just as good and just as much of it as ever.

We are of the opinion the plaintiff has a right of action

against the defendant for the injury sustained by him, and a right to recover substantial damages. The court below was right in overruling the demurrer to the evidence; but erred in rendering judgment for only nominal damages and costs. As the demurrer was probably taken upon a mistake in view of the law, and possibly admits a larger measure of damages than the facts and justice of the case would warrant, we refrain from entering final judgment upon the demurrer in this court. The judgment is reversed and the cause remanded.

Reversed and remanded.

1. Injunction to restrain removal of barriers: *Thomas Co.* v. *Allentown Co.* 28 N. J. Eq. 77; *Post* INSPECTION.

2. Lessee not bound to maintain barriers against adjoining colliery of his lessor: *Jegon* v. *Vivian*, L. R. 6 Ch. App. 742; *Post* LEASE.

3. Removal of barriers resulting in flooding lower mine: *Smith* v. *Kenrick*, 7 C. B. 515; *Post* FLOODING; *Crompton* v. *Lea*, L. R. 19, Eq. 115; *Post* FLOODING.

4. Excavating beyond boundaries: *Clegg* v. *Dearden*, 12 Q. B. 575; *Post* DRAINAGE.

5. Action on the case for neglect to maintain barriers: *Firmstone* v. *Wheeley*, 2 Dow. & L. 203; *Post* PLEADING.

6. Coal left in barrier, not workable ground: *Shafto* v. *Johnson*, 8 B. & S. 252; *Post* WORKINGS.

WORDEN v. DODGE ET AL.

(4 Denio, 159; Red. & B. Leading Cases, 7. Supreme Court of New York, 1847.)

Payable out of ore. An instrument by which a party promises to pay a certain sum at a stated time out of the net proceeds of ore to be raised and sold from a certain ore bed, is not a promissory note, it being payable upon a contingency.

Assumpsit. On the trial the plaintiff gave in evidence an agreement, signed by the defendants, bearing date October 12, 1839, by which, for value received, they jointly and severally promised to pay to the plaintiff, by his name or order, $250, with interest, payable one half in two years and the other half in three years from the date of said agreement, "out of the net proceeds, after paying the costs and expenses of ore to be raised and sold from the bed on the lot this day conveyed by Edward Madden to Edwin Dodge, which bed is to be opened and the ore disposed of as soon as conveniently may be."

On reading the agreement the plaintiff rested, and the defendants moved for a nonsuit, as the plaintiff had not shown that the defendants had received enough from the ore to pay the note, nor had they shown any default or negligence on their part. The judge held that the plaintiff could not recover without proving that the defendants had received funds from the ore to enable them to pay, or had neglected to work the ore bed, and directed a nonsuit.

The plaintiff excepted.

A. B. JAMES, for the plaintiff, moved to set aside the nonsuit, and for a new trial.

J. A. SPENCER, for the defendants.

BEARDSLEY, J.

The nonsuit was proper. A promissory note must be payable absolutely, and not upon any contingency as to time or event: 3 Kent, 5th Ed. p. 74; Smith on Merc. Law, 113, 116;

Story on Prom. Notes, §§ 1, 22 to 26; Id. on Bills of Exch. §§ 46, 47; Chit. on Bills, 10th Amer. Ed. pp. 132 to 139.

This was not such an engagement, for although the promise was to make payments at certain specified times, the payments were to be made "out of the net proceeds" "of ore to be raised and sold" from a certain ore bed.

Here was a contingency; the fund might turn out to be inadequate, in which case there would be no obligation to pay at any time. It was not a promise to pay "absolutely and at all events," as a promissory note always is.

New trial denied.

TEMPEST ET AL. v. ORD ET AL.

(1 Madd. Ch. 59. Court of the Vice Chancellor of England, 1815.)

Payment with bill. The *manager* of a colliery having given a bill of exchange in discharge of a debt for an engine and the bill being dishonored, the creditor, unless he has purchased the bill out and out, has a right to resort to his original cause of action, and hold the *owner* of the colliery, therefor.

Phineas Crowther made a steam engine for a colliery, part of the estate of the plaintiff, Lady Frances Ann Vane Tempest, and applied in May last to Arthur Mowbray, the receiver or manager (under an order of the court) of the collieries of Lady Tempest, for payment of the sum of 800*l.*, the price of the engine. Mowbray upon such application gave Crowther a bill of exchange for 800*l.*, at two months, drawn by the bank of Durham, in which Mowbray was a partner, upon their house in London; and Crowther gave a receipt, as for so much money received, in discharge of his demand.

Before the bill became due, the bank at Durham, and that in London, failed, and a commission against the Durham bank issued on the 22d of July last, and Mowbray, and the rest of the firm, were declared bankrupts; and assignees were afterward chosen.

Since the issuing of the commission the bill of exchange was returned to Crowther for non-payment.

A petition was now presented by Crowther, stating these facts, and that the petitioner had been informed, and believed that Mowbray was passing his receiver's accounts before the Master; and that by means of his being enabled to take credit by virtue of the petitioner's receipt for the sum of 800*l.*, Mowbray would appear to be a creditor for a considerable balance due to him from the infant's estate; and prayed, that upon delivering up the bill of exchange, the sum of 800*l.* might be paid him out of the moneys remaining in the name of the accountant general, in trust in the cause, which would otherwise be applicable in payment of the balance due to Mowbray; and that in the meantime no payment might be made to, or money received by Mowbray, or his assignees in discharge or reduction of such balance.

Mr. BELL, for the petition, cited *Glossup* v. *Harrison*, Coop Rep. 61.

SIR SAMUEL ROMILLY and Mr. MONTAGUE against it, cited *ex parte Hale*, 3 Ves. 304, as showing no set-off would be allowed in such a case.

THE VICE CHANCELLOR.

The justice of the case, independent of authorities is clear. Crowther has supplied goods and received a bill, which turns out to be mere waste paper, and ought not therefore to be considered as a payment.

Where a bill of exchange is given in payment of a debt, and the bill is not paid, the creditor, unless he has purchased the bill out and out, has a right to resort to his original cause of action: *Puckford* v. *Maxwell*, 6 T. R. 52; *Owenson* v. *Morse*, 7 T. R. 64. So, if before a bill becomes due it is dishonored, the creditor may resort to his original debt.

If Mowbray himself had been the original debtor, Crowther, the bill not being paid, might have resorted to him for payment of the debt.

The order for the engine was given by Mowbray, as agent, and being known to be acting as agent, he could not be liable himself to pay.

Having taken a bad bill from the agent, Crowther is entitled

to call upon the principal for whose use the engine was furnished.

If Mowbray had paid the 800*l.* he might have recovered against Lady T. V. Tempest, for so much money laid out and expended for her use; but as the bill was returned unpaid, he could make no such charge against her.

The receipt was not properly drawn. It should have been for so much money when the bill of exchange was paid.

This is not a case of set-off, and therefore *ex parte Hale* is inapplicable.

The justice to all parties is, that the bill of exchange must be given up to the assignees, and the colliery must pay Crowther his demand.

Petition granted.

MOSS v. LIVINGSTON.

(4 New York, 208. Court of Appeals, 1850.)

Acceptance—President held personally liable. A bill of exchange was drawn by one agent of a company upon another agent, the defendant, in favor of a third, who indorsed it to the plaintiff in payment of wages due from the company. Defendant accepted the bill thus: "Accepted Sept. 14, 1846, John R. Livingston, Jr., President Rosendale M'ng Co., 16 Wall St." Upon suit brought on this acceptance it was *held*, that the bill was properly received in evidence, the addition to defendant's name in the bill being descriptive of his person rather than qualifying his obligation; that the company was not bound by the acceptance and that defendant was individually liable.

Appeal from the Superior Court of the city of New York where the cause was tried before OAKLEY, C. J. The plaintiff had a verdict. That court on a case made affirmed the decision at the trial, and after judgment the defendant appealed to this court. The case is stated in the opinion of HURLBUT, J.

BELL & COE, for appellant.

S. W. ROSEVELT, for respondent.

HURLBUT, J.

The declaration in this case contained the common money counts with a notice subjoined, to the effect that the only cause of action on which the plaintiff relied, was a bill of exchange. A copy of which was set out in these words:

EAGLE RIVER, August 20, 1846.

Sixty days after sight, please pay to the order of Charles Ellett, Sup't, three hundred dollars value received, and charge the same as advised. ABRAHAM MORRELL.

To JOHN R. LIVINGSTON, JR.,
President Rosendale M'ng Co., New York.

(Indorsed.) Pay to the order of Theodore F. Moss, Esq.
CHARLES ELLETT, Sup't.

Accepted Sept. 14, 1846.

JOHN R. LIVINGSTON, JR., President, Rosendale M'ng Co., 16 Wall St.

The defendant pleaded non-assumpsit and payment. On the trial the plaintiff offered the bill in evidence and it was received by the court, although objected to by the defendant on the ground, as it would seem from the points now presented, that the declaration did not describe the defendant as president of the Rosendale Manufacturing Company, nor contain an averment that the defendant and the president of that company were one and the same person.

There is nothing in this objection. The addition to the defendant's name, which was contained in the bill, must be taken as descriptive of his person, rather than as qualifying the obligation which he assumed. The pleader was, therefore, correct in omitting this description in the declaration, and the bill was properly received in evidence under it.

There was a motion for a nonsuit, which was based on the following conceded facts: That there existed a corporation under the laws of this State, called the "Rosendale Manufacturing Company," having an office in New York, and which was engaged in smelting copper ore. That the defendant was its president, and that Ellett, the payee, and Moss, the plaintiff, were its agents in various capacities; and that the bill in suit was drawn by the agent at Lake Superior, and paid to the plaintiff for his wages due from the company.

Are these facts sufficient to defeat the obligation of the bill in respect to the defendant? The plaintiff received it for a valuable consideration. It is in the proper form of a bill of exchange, and we must intend that it was made and indorsed to him with the intention of binding either the company or the parties whose names appear upon it, according to its legal import and effect. Upon the facts presented the company might very properly have become bound by a bill to pay the plaintiff; but at the same time, it was competent for their agents or officers to assume to pay in their stead; and there is nothing in the case or on the face of the bill itself, which in judgment of law negatives such an intention on their part. The bill can not be deemed the obligation of the company. It does not purport to have been drawn in their behalf, nor was it addressed to them, or accepted in their corporate name. They were not, therefore, bound by it: Chitty on Bills, Ed. of 1826, p. 38; *Mott* v. *Hicks*, 1 Cowen, 513; *Barker* v. *The Mechanics Fire Ins. Co.*, 3 Wend. 94.

In order then to give it any legal effect, we must hold it to be the private act of the parties whose names are written upon it, and binding upon them as an ordinary bill of exchange: *Hills* v. *Bannister*, 8 Cowen, 31; *Taft* v. *Brewster*, 9 John. 335, and n. *a.*; *Bay* v. *Gunn*, 1 Denio, 108. The judgment must be affirmed.

All the judges of the court concurred in opinion that the judgment should be affirmed; several of them, on the ground that the defendant did not show himself authorized to bind the corporation by the acceptance in question.

Judgment affirmed.

NICHOLLS v. DIAMOND.

(23 Law Journal Exchcq. 1. Court of Exchequer, 1853.)

Bill of exchange Acceptance—Want of authority—Personal liability. A bill of exchange, directed to the defendant thus: "To J. D., Purser, West Downs Mining Company," was accepted by him in these

terms: "J. D., accepted per proc. West Downs Mining Company." J. D. was a member of the company, but was not authorized to accept bills on their behalf: *Held*, that he was personally liable.

Assumpsit on two bills of exchange for 64*l.* 1*s.* each, drawn by the plaintiffs upon and accepted by the defendant.

Plea—*Non acceptavit.*

At the trial, before TALFOURD, J., at the last Exeter Summer Assizes, the facts were these: The defendant was the purser of the West Downs Mining Company and also a shareholder in the company, and the bills upon which the action was brought were directed to him thus: "To Mr. James Diamond, Purser, West Downs Mining Company." The acceptance was in this form: "James Diamond, accepted per proc. West Downs Mining Company." The defendant, at the time of accepting the bills, stated that he would not be personally bound; and he was not in fact authorized by the company to accept bills. For the defendant, it was contended that the bills were not drawn according to the custom of merchants, and that he was not liable. The learned judge overruled the objection, being of opinion that the defendant was personally bound by his acceptance; and under his Lordship's direction the jury found a verdict for the plaintiffs for the amount claimed, leave being reserved to the defendant to move to enter a verdict for him.

MONTAGUE SMITH now moved accordingly.

The action is not maintainable on the bill by the custom of merchants. The company are not liable on this bill; and it would be hard to make the defendant responsible when he stated that he would not be personally liable, more especially as he could not have pleaded in abatement the non-joinder of the members of the company. Again, no party is liable as acceptor except the party to whom the bill is addressed, and the bill is addressed to the defendant as purser of the West Downs Mining Company: *Polhill* v. *Walter*, and *Ex parte Buckley In re Clarke.*

(ALDERSON, B.—The address to him in that form is descriptive only.)

(PARKE, B.—The bill is drawn on him individually, and he

accepts it for the company of which he is a member. He is not the less bound because he accepts it for himself and others. He was not compelled to include the others; they are not bound, but he is.)

The plaintiff is seeking to fix a man individually who states expressly that he does not intend to bind himself.

(POLLOCK, C. B.—He can not take advantage of the firm not being bound. He may bind himself.)

He cited *Bult* v. *Morrell.*

(PARKE, B.—Here is a bill directed to A by a certain description. A accepts it in his own handwriting, for himself and also for B, C and D. Surely A is bound, although the three others may not be bound.)

POLLOCK, C. B.—There will be no rule. In this case the defendant accepts for himself and others. Now, this he had no right to do, if either he were a member of a firm having no authority from the firm to accept bills, or if the bill had been accepted by him to pay his private debt. In this case he has accepted the bill for himself and a firm, having, in fact, no authority to accept it for the firm; but he can not on that account be the less liable personally.

PARKE, B.—I think the judge at the trial was right in the view he took of this case. The bill was directed to the defendant personally. He was the drawee, and he accepted the bill on behalf of the company. Now, if he were the agent for the company, and that company consisted of himself and five others, then he had power to bind himself as principal and the others as agent. But, if he had no authority to bind the five, then he alone is bound as the drawee, being made liable by what he has signed in his own name. He can not be agent for himself, and therefore he binds himself as principal.

ALDERSON, B.—I am of the same opinion. The bill is drawn upon the defendant personally. He accepts it for himself and others. He is not entitled to accept it for others, but he has a right to accept it for himself. He does not the less accept the bill for himself because he had no right to accept it for others.

Rule refused.

MARE ET AL. v. CHARLES.

(5 El. & Bl. 978. 85 Eng. C. L. 977. Queen's Bench, 1856.)

Acceptor, held personally. An order to pay to the drawer's order at a time certain after date, a sum of money for "value received in machinery supplied the Adventurers in Hayter & Holne Moor mines" was directed to the defendant, who wrote upon it "Accepted for the company, W. C., Purser": *Held*, that the defendant was personally liable as acceptor of the bill.

The declaration contained three counts for the non-payment, respectively, of three different bills drawn by the plaintiffs, and accepted by the defendant. Pleas: That the defendant did not accept the bills.

On the trial before CROMPTON, J., at the Middlesex Sittings in Michaelmas Term, 1855, the three bills were proved. The form of one of them was as follows:

£102. 0s. 6d. PLYMOUTH, December 9, 1854.

Three months after date pay to our order in London, the sum of one hundred and two pounds and six pence value received in machinery supplied the adventurers in Hayter & Holne moor mines.

JOHN E. MARE & Co.

To Mr. W. CHARLES,

27 Austin Friars, London.

[Across the face of the bill was written the following: "Accepted for the company. Payable at the Union Bank. William Charles, Purser."]

The two other bills were in a similar form. The defendant was purser of the mining company, and was not one of the adventurers.

The learned judge directed a verdict for the plaintiffs, with liberty to move to enter a nonsuit.

MONTAGUE SMITH, in the same term obtained a rule *nisi* accordingly.

LUSH now showed cause. The bills were addressed to Mr. W. Charles; and, as no one but the drawee can accept a bill,

unless for honor, the acceptance written across the bill must operate as Charles's personal acceptance, or it is void altogether. The general rule is that an ambiguously worded instrument is to be construed *ut res magis valeat, quam pereat*, but here it is scarcely necessary to have recourse to that maxim; for the language of the acceptance imports that Charles accepts, though he does it for the company. [Lord CAMPBELL, C. J.—There are several cases in which a contract has been held to bind the person making it, though on the face of the contract, he states that he contracts for another. See *Tanner* v. *Christian*, 4 E. & B. 591; E. C. L. R. Vol. 82.] It is in such cases a question whether it was the intention, apparent on the instrument, to bind the agent personally. Here Charles, being the drawee, and knowing, or being taken to know, the law merchant, must have intended to accept personally. The case seems undistinguishable from *Thomas* v. *Bishop*, 2 Stra. 955. At the trial the defendant cited a dictum of PARKE, B., in [1]*Nicholls* v. *Diamond*, 9 Exch. 154, 156.

Where he is reported to have said, during the argument: "If the defendant had not been a principal in, but merely an agent for, the firm, he would not have been liable, for he signs the bills as principal on his own account, and as agent for the others." Probably this was said in relation to something thrown out during the argument which has been omitted in the report; for, as it stands, the dictum is not very intelligible; but the judgment of PARKE, B., in the same case, is strongly in the present plaintiff's favor. He says: "These bills of exchange are directed to the defendant in his personal character, and he, being the drawee, accepts them for the firm. Now, the legal effect of this acceptance is, that the defendant accepts the bills in his own right as principal and as agent for all the other members of the firm. If the firm consists of several other members, they would not be bound, for nothing is more clear, as a general rule, than this, that no person but the drawee of a bill is bound by the acceptance, and here the rest of the company are not drawees."

MONTAGUE SMITH and GARTH, in support of the rule. The bills purport to be drawn on account of goods supplied to the company; and the defendant accepts them for the company, describing himself in the signature as the purser. [Lord

[1] Ante, 120.

CAMPBELL, C. J.—But the bills are addressed, not to the company, but to Mr. W. Charles.] The holders of the bill were not bound to take this as an acceptance; they might have treated the draft as dishonored; but they have decided to take it, and now they seek to bind the defendant personally when he has guarded himself against it. In *Nicholls* v. *Diamond* the defendant was himself one of the firm, and was held liable on that account; but the dictum of PARKE, B., shows that if he had not been a member of the firm it would have been different. [WIGHTMAN, J.—In *Nicholls* v. *Diamond* the defendant signed per proc. That is a well understood form, signifying, I am a mere scribe, writing the name of another by his authority.] The cases are collected in *Owen* v. *Van Uster*, 10 Com. B. 318 (E. C. L. R. vol. 70.) [CROMPTON, J.—Signing per proc. A B is attesting that the name A B was written by the authority of A B, and has precisely the same effect in pledging credit that the simple signature A B would have. A signature in the present form may mean that the writer pledges his own credit; so that you can hardly say this signature is not at least ambiguous.] *Thomas* v. *Bishop*,[1] 2 Stra. 955, has been questioned in America. In Story on Agency, note 3 to sect. 159, it is said: "This case seems to press the doctrine to the utmost limit of the law, if, indeed, upon principle, it is sustainable at all.

CAMPBELL, C. J.—I am of opinion that the defendant is personally liable; and I come to this conclusion both upon authority and upon principle. The bill is drawn on the defendant as an individual; it is addressed "To Mr. W. Charles." It is true it is stated to be drawn for value supplied to the adventurers in a mining company, but it is drawn on Charles as an individual. He writes upon it "accepted for the company," and he signs this "William Charles, purser." If the words of an instrument will reasonably bear an interpretation making it valid, we must not construe them so as to make it void. *Benignæ faciendæ sunt interpretationes, ut res magis valeat, quam pereat; et verba intentioni, non e contra, debent inservire.* If a bill be drawn on me I must accept it so as to make myself personally liable or not at all; for no one but the drawee can accept. I think, therefore, that, when a drawee accepts a bill, unless there be on the face of the bill a

[1] S. C. cited post 129.

distinct disclaimer of personal liability, he must be taken to accept personally. In the present case, the acceptance is not "per proc. the company." If it were, perhaps that might have some weight as amounting to such an absolute disclaimer of personal liability. It appears on the face of the bill that it is drawn on account of a debt of the company; it is very likely that the drawee accepted on account of the company and on an engagement from them that they would help him in funds to meet the bills. In that case he may well be said to accept for the company; but then it is an acceptance making himself personally liable. Then on authority, *Thomas* v. *Bishop*, it appears, has been doubted on the other side of the Atlantic; but for a century it has been uniformly considered good law in this country, and it is clearly in point. In *Nicholls* v. *Diamond* the decision itself, and far the greater part of the reasoning in the judgments, are precisely what we now adopt. It is not necessary to form an opinion as to the effect of an acceptance per procuration to which the dictum cited seems to point, or to say whether we agree with or differ from it.

COLERIDGE, J.—I am of the same opinion. The bill was addressed to the defendant, and no one else could accept it. He wrote upon it, "accepted," and signed his name. He now says, in effect, that it was not accepted at all, and that what he wrote amounted to a refusal to accept; and this he says is the effect of the words "for the company." The question then is, are we to construe this *ut res magis pereat*, as not an acceptance? No; we must construe it *ut res magis valeat;* and as my lord has pointed out, it is easy so to construe it.

WIGHTMAN, J.—The bill is drawn on the defendant for value received by a company. The defendant accepts it, adding to the word accepted "for the company." He may have accepted it on their account, and relying on their liability to him; but, whatever was his motive, he accepted it, and can not now ask us to construe the acceptance so as to be inoperative. Unless he accepted the bill, drawn upon himself personally, in the sense that he rendered himself personally liable, he did not accept it at all; on any other construction, what he wrote on the bill must have amounted to a refusal to accept it. But it is clear that he did intend that the bill should

not be dishonored, but accepted; and we must construe what he has written *ut res magis valeat.*

CROMPTON, J.—It is clear to my mind that the words used in this bill may bear the meaning that the defendant accepted for the company, in the sense explained by my lord and my brother Wightman. Perhaps the words may also bear the other meaning, that the defendant was acting as the mere hand of the company in writing their acceptance. It is not so clear that they could bear that meaning; but suppose it to be so, the person writing on a bill "accepted," means that there shall be an acceptance. Unless a bill is accepted by the drawee, there can be no acceptance. We are to construe an instrument as a whole, so as to give effect to every part of it, unless it is clear that this is contrary to the intention. If, therefore, a bill be drawn on a person, and the drawee writes upon it "accepted," he must be taken to accept it as it was drawn on himself, personally, unless clear and unambiguous words are used to exclude his personal liability. The regular mercantile mode by which the person signing for another declares that he means to exclude personal liability is, by signing per procuration for that other.

Rule discharged.[1]

[1] See *Russell* v. *Phillips*, 14 Q. B. 891 (E. C. L. R. vol. 68).

LALLERSTEDT v. GRIFFIN.

(29 Georgia, 708. Supreme Court, 1860.)

Personal acceptance. A draft drawn upon one as treasurer of a mining company but accepted in his individual name, may be treated as his personal contract.

Error to the Columbia Superior Court.

The action below was assumpsit and the plaintiff had been nonsuited before Judge HOLT, at September term, 1859.

The action had been brought by Lallerstedt, indorsee, against Griffin, upon a draft of which the following is a copy:

AUGUSTA, GA., 29th Oct., 1858.

To W. A. Griffin, Treasurer of the Griffin Mining Co.:

Ninety days after date, pay to the order of John M. Galt, President, five hundred and thirty-seven dollars and five cents, for value received.

(Signed,) JOHN MILLEDGE,
Sec'y G. M. Co.

(Endorsed,) JOHN M. GALT, President.

And which draft was accepted by the defendant, by writing across the face of the paper, "*Accepted, W. A. Griffin.*"

At the trial, plaintiff offered in evidence the draft. Defendant objected to its introduction, on the ground that the acceptance created no liability upon him individually, but was an undertaking of the Griffin Mining Company.

The court sustained the objection, and excluded the paper, and ordered a nonsuit. To which ruling and decision, counsel for plaintiff excepted.

GIBSON & LALLERSTEDT, for plaintiff in error.

MILLERS & JACKSON, *contra.*

By the Court, LUMPKIN, J., delivering the opinion.

Was the court right in nonsuiting the plaintiff?

If the acceptance by Griffin might be treated as an individual undertaking, then the ruling was wrong, and that it might be so considered, we think is abundantly sustained by the books: Story on Agency, 159; 6 Bac. Abr. 802, 807; 2 Str. Rep. 955; Cas. Temp. Hard. 1; 1 Bailey on Bills, 5th edition, ch. 2, sec. 7, note 48; Paley on Agency, by Lloyd, ch. 6, sec. 1, pages 378, 379.

It is true, that Judge STORY, in commenting upon the case of [1]*Thomas* v. *Bishop*, 2 Str. Rep. 955, and which is the starting point for the doctrine, says that it seemed to press the rule to the utmost limit of the law, if indeed upon principle, it is sustainable at all. He did not deny, however, that upon authority, it was within the limit of the law. On the contrary, we apprehend the general rule to be, that where an agent, professedly dealing in the name of his principal, yet

[1] S. case cited ante, 125.

signs the contract individually, it is at the election of the other party to treat it as his own personal contract, and this is a just inference from the form of the contract itself, as to what was the intention of the person sought to be made liable.

Judgment reversed.

SHAVER v. OCEAN MINING COMPANY.

(21 California, 46. Supreme Court, 1862.)

Agent—Liability and authority of. Suit was brought against the Ocean Mining Company, James Harter and S. N. Stranahan upon the following note: "Three months after date the Ocean Mining Company promise to pay W. G. Bright or order one thousand dollars, for value received, with interest at the rate of two per cent. per month." Signed, "James Harter, trustee, S. N. Stranahan," and judgment entered against all of the defendants for want of an answer. Harter and Stranahan appealed. *Held*, that the note showed upon its face that it was a company obligation and binding on the company alone, and not upon Harter or Stranahan individually.

Appeal from the Fifth Judicial District.

C. DORSEY, for appellant.

L. QUINT, for respondent.

COPE, J., delivered the opinion of the court—FIELD, C. J., and NORTON, J., concurring.

This is an action on a promissory note in the following form: "Three months after date the Ocean Mining Company promise to pay W. G. Bright or order one thousand dollars, for value received, with interest at the rate of two per cent. per month." The note is signed, "James Harter, Trustee, S. N. Stranahan," both of whom are made defendants, and charged as makers jointly with the company, which is a corporation. No answer being filed, judgment was entered against all of the defendants; and from this judgment Harter and Stranahan appeal.

The complaint alleges that the note was executed by Harter and Stranahan, as well as by the company; but the note itself, a copy of which is set out in the complaint, shows that it was not their intention to bind themselves personally. The promise stated in the note is that of the company, and by failing to answer, the note is admitted as a company obligation, and this being the character of the instrument, as appearing upon its face, we regard it as binding upon the company alone. It is evident that Harter and Stranahan signed it merely as agents, and as a judgment has been recovered upon it against the company, their authority to execute it can not be questioned; its language shows that they executed it for the company and not for themselves. The law governing the case is distinctly laid down in *Haskell* v. *Cornish*, 13 Cal. 45.

The judgment is reversed as to Harter and Stranahan, and the cause remanded.

HECKSHER & Co. v. SHOEMAKER ET AL.

(47 Pa. St. 249. Supreme Court, 1864.)

Coal sales—Notes running with the account—Discharge. Where a mining operator sold his coal to a dealer who, under his contract immediately indorsed all notes received for sales to his customers, over to the operator as security: *Held*, that each note so indorsed was taken as security for the whole amount, including what coal had been or might be shipped; and that while any indebtedness existed from the dealer to the operator, payment of his note by the maker to the payee (the coal dealer) did not discharge the maker's liability thereon. *Held*, also, that the makers of the note were not discharged from liability by its presentment at bank where there were sufficient funds to meet it when due, if by mistake of the bank officers, payment was refused and the note protested for non-payment.

Error to the Common Pleas of Chester County.

This was an action of assumpsit by Richard Hecksher and Eugene Borda, trading as Hecksher & Co., against John G. Robinson and Kersey Shoemaker, trading as Shoemaker & Robinson.

The plaintiffs declared on a promissory note drawn by defendants to the order of Thomas J. Atwood for $173.59, dated December 8, 1856; protested for non-payment April 11, 1857.

The plaintiffs were coal operators in Schuylkill county. The defendants were in the coal business in Chester county. Atwood was a middle man in the coal business in Pottsville, and was in the habit of purchasing coal from the plaintiffs for sale to smaller dealers in Pennsylvania, and elsewhere.

Hecksher & Co. furnished Atwood with monthly statements, charging him with the coal delivered to him or his order; and crediting him with cash payments, and with the notes which he received from time to time from coal dealers in New York, Philadelphia and elsewhere, and transferred to them.

When Atwood commenced buying coal from plaintiffs, he gave them the following writing:

"Mr. E. Borda: I pledge myself on my honor as a man to hand to you, when received, the cash or notes which I receive for the coal you let me have, and will make it, besides, a confidential matter.

"THOMAS J. ATWOOD."

When notes were handed over under this arrangement they were credited as cash; if not paid, they were passed by plaintiffs to their protest account, and recharged to Atwood.

The testimony showed that Atwood was in debt to plaintiffs from the commencement of this arrangement until his failure in December, 1857, the amount being at no time less than $3,000; the whole sum of his indebtedness when he ceased to purchase coal, December 1, 1857, being $5,276, which remained unpaid.

The notes thus taken from time to time by plaintiffs if not paid at maturity were retained by them as security until satisfied in some other way, when they were given up to the proper person.

On the 8th December, 1856, Shoemaker & Robinson bought some coal of Atwood, and in payment gave him this note for $173.50, payable in four months at the Bank of Chester County, which was afterward transferred to plaintiffs.

At and before the time the note fell due, there was in the bank a much larger sum than the amount of the note in the name of Robinson, to be applied under his directions to notes of Shoemaker & Robinson. By an error of one of the officers of

the bank, a deposit made by Mr. Robinson had not been carried to his account, so that the balance appearing to his credit was not enough to take up this note when it was presented.

The note had been indorsed by Atwood in blank and passed to the plaintiffs, for whom it was discounted at the Miners Bank of Pottsville, and transmitted through a Reading bank to the Bank of Chester County. The note was protested April 11, 1857 and returned to the Reading Bank. It would have been charged to Robinson's account, as the teller testified, if sufficient funds had appeared to his credit.

On the 14th of April, Robinson having learned that the note had been protested, went to the bank and, upon examination with the officers, the mistake in his account was found and corrected. He then sent a check of the proper amount, marked "good," to the Reading bank to take up the note. The note having been sent to the Pottsville bank, the check was returned unused.

On the 27th of April, Robinson was again at the Bank of Chester County, and, upon consultation with the cashier, another check for the proper amount was filled by a teller payable to Thomas J. Atwood, signed by Robinson, marked "good" by the cashier, charged to his account and transmitted by Robinson to Atwood to take up the note; this check came back indorsed by Atwood.

The note in suit was charged back to Atwood, "April 20, 1857"; the balance against him at the end of that month was $3,816.12; the balance (including this) at the end of May was $4,793.03; at the end of June it was $3,180.93. The balances thereafter increased every month, and at the time of Atwood's failure, December, 1857, the balance against him was $5,276.85. After the balance of May, 1857, Atwood's credits were above $19,000, of which $3,091.29 were cash.

It did not appear that any special appropriation was made to this note. Atwood being always in debt to plaintiffs on his book account, payments made by him were applied to it. The payments made after the protest of this note amounted to $19,000, which it was alleged by defendants extinguished it. But, as the note had been recharged before the statement made in May, 1857, the plaintiffs insisted that it was excluded from that account, and was only held by them as security until it should be taken up by the drawer or indorser, which

was never done by either. The check sent April 27, 1857, by defendants to Atwood, was not used by him for this purpose.

The plaintiffs' counsel requested the court to charge the jury:

1. If the jury believe that the plaintiffs actually appropriated the payments of Atwood, made subsequent to the maturity of the note, to their account against him, other than that for which the note was given, the plaintiffs are entitled to recover.

2. There is evidence for their consideration that such appropriation was made by plaintiffs.

3. In the absence of other proof, the retention of the note by plaintiffs is a decisive circumstance to prove that such appropriation was made.

4. In the absence of all proof of appropriation by plaintiffs and Atwood, the law appropriates the payment to the debt least secured.

5. In such cases and under the circumstances here presented, the law appropriates the payment to the book account not covered by the note.

6. That the course of dealing between Hecksher & Co. and Atwood gave the right to Hecksher & Co. to hold the note, and look to the drawers for payment, unless it was specially paid and taken up by Atwood, and not until actual payment, either by the drawres or by the payee of the note, was Atwood entitled to a credit for its amount on the running book account, and the plaintiffs are entitled to recover.

7. If the jury believe that it was part of the original understanding between plaintiffs and Atwood, that the latter should pass to the former the notes he should receive for coal sold, and Atwood handed over the note in question in pursuance of that arrangement, it was received in satisfaction of so much of the account as was covered by it, and plaintiffs could not afterward sue upon the account therefor.

8. In such case, recharging the note did not make it part of the account, and the law applies the payments subsequently made to the account, and not to the note, and the plaintiffs are entitled to recover.

Under the charge of the court, there was a verdict and

judgments for defendants. This writ was then sued out by plaintiffs, for whom the following errors were assigned:

1. The court erred in saying: "As already stated, it appears to be an open current account, the items not forming distinct debts, but blended together. If the payments made by Atwood were credited to his general account, and balances from time to time struck, in rendering statements to Atwood, these acts of the plaintiffs tend to show that they applied the money received to all the items of the account, due at the time such payments were made or statements rendered, and if they did so apply it and the amount received by them after the note was transferred was sufficient to discharge the note of that part of the indebtedness which it was held to secure, together with all other items in the account, then the note, as we before remarked, must be regarded as belonging to Atwood."

2. In charging as follows: "What is the evidence that the plaintiffs applied the money received to other parts of their claim against Atwood than the note, or rather the debts secured by it? I see none, aside from what is to be found in the fact that they retained the note in their possession, and on considering the weight of this, it must be remembered that it does not appear that any demand was made on account of the note for more than a year after it matured."

3. In charging as follows: "As already stated it appears to be an open current account, the items not forming distinct debts, but blended together. If the payments made by Atwood were credited to this general account, and balances from time to time struck, in rendering statements to Atwood, these acts of the plaintiffs tend to show that they applied the money received to all the items of the account due at the time such payments were made or statements rendered; and if they did so apply it, and the amount received by them after the note was transferred was sufficient to discharge the note, or that part of the indebtedness which it was held to secure, together with all other items of the account, then the note, as we have before remarked, must be regarded as belonging to Atwood."

4. In charging "If the plaintiffs retained the note for more than a year after it matured and was protested, without making any effort for its collection, and without demanding payment, it affords additional evidence for your consideration

that the claims of the plaintiffs upon it were discharged."

5. In refusing to affirm the plaintiffs' sixth point, and answering it as follows: "The plaintiffs had a right to hold the note and look to the drawers until the debt, which it was transferred to secure, was paid. That the payment of this debt would discharge their claim on the note, and if it was so paid by the appropriation of the money received from Atwood, the failure to take it up is immaterial. If it were not so paid, the plaintiffs had a right to hold the note, and are entitled to recover upon it now."

6. In refusing to affirm the plaintiffs' seventh and eighth points, and answering as follows: "The seventh point we can not affirm. The case will be submitted to the jury on the question of appropriation by the parties, with instruction to find for the plaintiffs in case none was made."

"The seventh and eighth points are disaffirmed; we can not charge as therein requested. In the absence of proof on the subject, the presumption would be that the note was accepted by the plaintiffs from Atwood as collateral security for the debt due to them and not in payment of it. But here, there is evidence corresponding with and strengthening this presumption."

U. V. PENNYPACKER and WILLIAM DARLINGTON, for plaintiffs in error.

P. F. SMITH and JOSEPH HEMPHILL, for defendants.

The opinion of the court was delivered March 28, 1864, by STRONG, J.

We do not concur in the opinion which the court below adopted in this case. The learned judge assumed that the note of Shoemaker and Robinson was transferred by Atwood, the payee, to the plaintiffs, to secure the debt which he owed them at the time of the transfer. Thus, in recapitulating the evidence to the jury, he said: "That by agreement between Atwood and the plaintiffs, Atwood was to deliver to them the notes which he might receive for sales made, as security for the money which he might at the time owe them; and that the note in suit was indorsed by Atwood to the plaintiffs in pursuance of this agreement as security for money due at that time." And again the jury were told that the note was passed to

the plaintiffs "as security for indebtedness then existing." Acting upon this assumption, the case was put to the jury to find whether that part of the debt contracted by Atwood to the plaintiffs, which existed when the note was indorsed to them, had been paid, with instructions that if it had, the ownership of the note reverted at the time of payment to him, and that a subsequent payment of the note to him was good and constituted a defense against this suit. Hence, actual or legal appropriation of the subsequent payments made by Atwood on his general account became important, even though they at no time extinguished the debt due when they were made. This would have been all right, if the assumption upon which the court proceeded had been well founded. But we discover nothing in the evidence that justifies any such assumption. It may be admitted the note was indorsed over as a security, but there is nothing to warrant the belief that it was indorsed as a security only for that portion of the account which happened to be due when the indorsement was made. The contrary is most manifest from every part of the evidence. A continuous course of dealing between Atwood and the plaintiffs was anticipated, when the arrangement was made that notes should be transferred, and acted out for a very considerable time. It began with a pledge of Atwood, that he would hand over to the plaintiffs the cash or notes received by him for coal which he might obtain from them. This contemplated what subsequently arose—a running account. The plaintiffs sold, and Atwood bought, coal from time to time; and every month cash and notes received by Atwood from his vendees of the coal, and from other vendees of other coal, were handed over and were credited in his account. If protested, they were taken out of the general account and charged in a protest account. At the end of every month an account current of sales of coal, and also an account current of protested paper, for that month, were furnished and they were both credited to the plaintiffs on Atwood's books. One witness states that "when our (Atwood's) account was paid up in full, the protested paper was handed back to Mr. Atwood." This means, of course, when the protested account was paid in full, for the other account never was paid. This witness also states that they (Atwood) had to make their pro-

test account good after the coal account was settled, that is, after what had been bought the previous month had been paid for. And again: "As Atwood would make the notes (speaking of those which had been protested) good, the usual habit was, he took them up and looked to the drawers for payment." The only other witness who speaks of the arrangement and course of dealing, says that Atwood got coal on the credit of the paper he was to hand over. The witness was the plaintiffs' clerk. He states that when the notes were unpaid and protested, they were charged back to Atwood and the notes kept as security; and he knew of no notes given up after protest, unless they were paid or satisfied in some way.

With such evidence of the understanding between the plaintiffs and their vendee, it is plain that the note in suit was indorsed over, not as a security for any one month's sales, or the balance due when the indorsement was made, but for the security of the whole account, including what had been and what might thereafter be furnished. There was but one debt apart from what was due on the protest account. The rendition of monthly statements did not sever the indebtedness. Of course, while anything remained unpaid on the coal account, the plaintiffs might hold the notes received as a security. It can not be maintained that Atwood could at any time have recovered this note back from his indorsees, and if not, then payment to him by the defendants was unauthorized. And the appropriation of the payments made on the general account, subsequent to the indorsement of the plaintiffs, is of no importance, for the account was never paid in full.

This view of the case renders it unnecessary to consider each assignment of error separately. Enough has been said to show wherein all the errors into which the court fell, consist.

We agree with the learned judge, in holding that the note was not paid, either in fact or in law, by what took place at the bank to which it was sent for collection. The bank was quite as much the agent of the promisors to pay as it was of the owners to receive.

Judgment reversed, and a venire de novo awarded.

THOMPSON, J., was absent at Nisi Prius when this case was argued.

PERKINS v. PROUT.

(47 New Hampshire, 387. Supreme Court, 1867.)

Burden of proof on fraudulent note. In suit by the indorsee of a note which is proved to have been obtained by fraud, duress, or upon an illegal consideration, the burden of proof is upon the plaintiff to show that he is a *bona fide* holder and for value.

Misrepresentations made to third parties. Where fraudulent representations are relied on to defeat a contract, proof of other like representations made by the same party about the same time to other persons in and about the same project, is admissible to show the intent with reference to the false representations made to the plaintiff.

Assumpsit upon a promissory note payable originally to Wm. A. Putney or order, and by him indorsed to the plaintiff.

The note purported to be dated March 16, 1865, for $1,750, payable in ninety days with interest. Plaintiff proved a demand upon defendant for payment Saturday, June 17th, and this writ was made Monday, June 19, 1865.

Defendant offered some evidence which the court held to be competent as tending to show that Putney obtained this note of defendant by fraud.

Whereupon the court ruled that the burden of proof was upon the plaintiff to show that he received the note in suit before its maturity, and without knowledge of the fraud or of such facts and circumstances as should have put him upon inquiry. To which ruling the plaintiff excepted.

It appeared that the note in suit was given for one undivided tenth part of 350 acres of oil lands in Western Virginia, which was purchased for the purpose of getting up an oil company. And the alleged false and fraudulent representations of Putney made to defendant were for the purpose of inducing him to buy this interest in said lands, for which this note was given, and thus become a member of said company. For the purpose of showing the *fraudulent intent* of Putney in making these representations to defendant, the court permitted the defendant to prove other similar alleged fraudulent representations made to other persons, in connection with the same subject-matter, and about the same time, for the purpose

of inducing such persons to purchase in the same manner and become members of said company, and in the absence of defendant. To which ruling plaintiff excepted.

There was some evidence tending to show that some deed purporting to convey said lands had been given to said Putney and others for the benefit of said company. But no deed was produced, nor were its terms or conditions proved, nor was it shown that there were any such lands in fact, or if there were, nothing was shown as to their condition or value.

The court instructed the jury that if defendant had received anything of value as the consideration of his note, he could not rescind the contract and avoid the payment of the note without first restoring or reconveying what he had thus received, or tendering or offering to do so, and as there was no evidence of any offer to restore in this case, if they found that defendant had received anything as the consideration of this note, which was of any value whatever, their verdict must be for the plaintiff; but if he had received nothing, or something entirely worthless and of no value whatever, and they found the note to have been obtained by fraud of which this plaintiff had notice when he purchased the note, their verdict should be for defendant.

To which ruling plaintiff excepted.

Verdict for defendant, which plaintiff moves the court to set aside.

MORRISON & STANLEY, for plaintiff.

This is an action of assumpsit upon a promissory note payable to Wm. A. Putney or order, and indorsed by him to the plaintiff.

Every promissory note is presumed to have a valuable consideration, and such presumption holds good until the contrary is shown: *Coburn* v. *Odell*, 30 N. H. 540.

Evidence was offered by the defendant, which the court held to be competent, as tending to show that Putney obtained this note of defendant by fraud, in consequence of which the court ruled that the burden of proof then devolved upon the plaintiff to show that he received the note in suit before its maturity, and without knowledge of such fraud or of such facts

and circumstances as were alleged in defendant's evidence, as should have put him upon inquiry.

Now the question arises whether or not the burden of proof, as the court ruled, devolved upon the plaintiff. If the defendant alleges fraud on the part of Putney, that avails nothing, as against the plaintiff, unless it is proved beyond a doubt that the indorsee was well aware of such circumstances as would have avoided the note in the hands of the indorser: *Perkins* v. *Challis*, 1 N. H. 254.

The case finds that the plaintiff gave for said note a valuable consideration, which was a little less than the face of the note; and that the note was indorsed before it became due. It would not invalidate the note at all in the hands of the indorsee, if evidence was offered that the plaintiff knew the note was given for certain oil lands, without proving that he also knew the oil lands were worthless: *Perkins* v. *Challis*, 1 N. H. 254.

By the ruling in the above case cited the inference is clearly drawn that the burden of proof devolves upon the defendant to show that the plaintiff had a knowledge of such facts, or of such circumstances as would have avoided the note in the hands of Putney.

In the case of *John Wheeler* v. *Albert Guild et al.*, 20 Pick, 545, SHAW, C. J., said: "The law in regard to bills of exchange and promissory notes is so framed as to give confidence and security to those who receive them for a valuable consideration in the ordinary course of business, when payable to bearer or indorsed in blank so as to be transferable by delivery; and, in general, a party taking such a bill under such circumstances, has only to look to the credit of the parties to it, and the regularity and genuineness of the signatures and indorsements. So that if such a bill or note be made without consideration, or be lost or stolen, and afterward be negotiated to one having no knowledge of these facts, for a valuable consideration and in the usual course of business, his title is good and he shall be entitled to receive the amount. And it will be presumed that the party thus in possession of a bill, holds it for value until the contrary appears; and the burden of proof is on the party impeaching his title": *Collins* v. *Martin*, 1 Bos. & Pul. 648. The same rule is held in *Doe* v. *Burnham*, 31 N. H. 426, and cases there cited.

In *Collins* v. *Martin*, EYRE, C. J., says: "No want of consideration, or other ground to impeach the apparent value received, was ever admitted in a case between an acceptor or drawer, and a third person holding the bill for value; and the rule is so strict that it will be presumed that he does hold for value, till the contrary appears; the *onus probandi* lies on the defendant."

The cases referred to by the court in *Clark* v. *Pease*, 41 N. H. 414, sustain the following principle: that when the defendant proves the note to have been illegal in its inception, and that the plaintiff took it without value, then simply the *onus probandi* devolves upon the plaintiff to prove that he gave a valuable consideration for it; but the ruling of the court in the present case goes much further, and requires the plaintiff —after the defendant has offered some evidence which the court held to be competent as tending to show that Putney obtained this note of defendant by fraud—to show that he received the note in question before its maturity, and without knowledge of the fraud, or of such facts and circumstances as should have put him upon inquiry; which ruling is completely overthrown by all the authorities cited in this brief.

It does not follow, that, if Putney did make misrepresentations to third parties, in the absence of the defendant, in connection with the same subject-matter, it proves anything definite in regard to Putney's having a fraudulent intent in making representations to the defendant.

It appears that defendant bought of said Putney an interest in certain oil lands in West Virginia, for which he gave his note, and thus he became a member of the company. The defendant must have known the general nature of these oil lands —whether, when they were tested for oil, they would produce large quantities or not—and according to the yield of oil so would be the value of his interest in said lands; and it is fair to presume that the defendant, when he bought his interest in said lands, was well aware of the uncertainty of their value; that they might prove very valuable, or they might not. Under all these circumstances it seems that the defendant ought to stand upon the ground of the real representations whatever they may be, that Putney made to him, which induced him to buy his interest in said land, and not allow the representa-

tions that were made to third parties to have any influence in this case.

Taking this view of the case, it seems that the instructions given by the court to the jury should have been modified, for the rulings of the court, and the instructions given to the jury, tended to deprive the plaintiff of a fair and just trial.

SAWYER & SAWYER, JR., for defendant.

The cases *Clark* v. *Pease*, 41 N. H. 414, and *Garland* v. *Lane*, 46 N. H. 245, established the doctrine as the law of this State recognized in other jurisdictions, that if a note is obtained by fraud, upon its coming into the hands of an indorsee, the burden of proof is upon him to show that he is *bona fide* indorsee for value.

As to the other point in the case, the admission of proof of other similar fraudulent representations made about the same time; we refer to *Bradley* v. *Obear*, 10 N. H. 477, and cases there cited.

No question arises upon the instructions relative to an offer to restore anything of value received for the note fraudulently obtained, as they were sufficiently favorable to the plaintiff, and the jury must have found that nothing of value was received.

BELLOWS, J.—It must be considered as settled in this State, that if a promissory note was obtained by fraud or duress, or upon an illegal consideration, and it is held in the name of an indorsee, the burden is upon him to prove that he is a *bona fide* holder, and for value: *Clark* v. *Pease*, 41 N. H. 414; *Garland* v. *Lane*, 46 N. H. 245.

Such were the instructions substantially in the case before us. As the evidence tended to prove that the note was obtained by fraud, it was proper and necessary to tell the jury upon whom the burden of proof rested in respect to the good faith of the transfer, leaving it to them to determine the question of fraud on the evidence. In respect to that evidence the court gave no opinion, and there is no exception to any instructions as to its competency to be considered.

The reason for casting the burden of proof upon the indorsee in such cases is to be found in the presumption, based upon experience in such cases, that a person who has illegally or

fraudulently obtained a promissory note will generally cause it to be sued in the name of an indorsee, with a view to shut out, or embarrass the defense that might otherwise be made. For this reason such transfers are usually regarded with suspicion; and hence the rule which throws the burden of proof upon the indorsee, who must very generally have the best means to show what the facts really are.

The proof of other fraudulent representations of the payee about the same time, and of a similar character, was admitted to show his *fraudulent intent* in this case, not to render it probable that he made such representations to defendant; and such evidence is admissible for that purpose. This is settled by the case of *Bradley* v. *Obear*, 10 N. H. 477, where the principle involved was the same as in the case at bar.

Upon the same ground, proof of other conveyances made about the same time as the conveyance in question, and with intent to defraud creditors, is admissible: *Whitton* v. *Varney*, 10 N. H. 294, and cases cited.

Indeed, when the knowledge and intent of a party is a material fact, proof of matters apparently collateral is admissible in many cases both civil and criminal: 1 Greenl. Ev., Sec. 53, and notes and numerous cases cited; 4 Stark. Ev. 377; Roscoe's Cr. Ev. 94. Among the cases of this sort are indictments for altering counterfeit money, and then altering other and similar counterfeit money about the same time, or having it in the prisoner's possession, may be received upon the question of guilty knowledge.

So in actions for slander, proof of other language used about the same time, is admissible to show malice: 2 Starkie on Slander, 54–57.

In Roscoe's Cr. Ev. 94, before cited, it is laid down without qualification, that wherever the intent of the prisoner forms part of the matter in issue, evidence may be given of other facts not in issue, provided they tend to establish the intent of the prisoner in committing the act in question, and the authorities cited by him fully sustain the doctrine.

The instructions as to the necessity of restoration were correct, and the exception appears not to be insisted upon.

Judgment on the verdict.

SCOTT v. BAKER.

(3 West Virginia, 235. Court of Appeals, 1869.)

Variance. Under the plea of *nil debet* the note produced in evidence must agree with the note sued on, and where the declaration counts on a note for $342, due two months after date, it is a fatal variance if the note offered in evidence call for $342.25, due sixty days after date.

Individual liability. A note subscribed "William Scott, President Blannerhassett Oil Co., W. H. Horner, Treasurer," is the individual note of the parties signing it, and they are personally liable therefor.

Action of Debt. The declaration in this case, which was filed at May Rules, 1867, in Wood county, is as follows:

The defendants, William Scott and William H. Horner, were summoned to answer the plaintiff, John W. Baker, of the city of Parkersburg, State of West Virginia, of a plea of debt, that they render unto the plaintiff the sum of three hundred and forty-two 25-100 dollars, and two 6-100 dollars, costs of protest which they owe to and unjustly detain from the plaintiff. And thereupon the said plaintiff, by Sands & Wilson, his attorneys, complains: For that whereas, the said defendants, on the 19th day of December, 1866, at the city of Parkersburg, in the county aforesaid, made their certain promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the order of the plaintiff three hundred and forty-two dollars, two months after the date thereof, at the Second National Bank of Parkersburg, which period has now elapsed, and the defendants, or either of them, have not paid, or caused to be paid, the amount of said note, or any part thereof, although the said note was afterward, to wit, on the 20th day of February, 1867, the same whereon the same became due, presented at the Second National Bank of Parkersburg, to wit, in the county aforesaid, yet the said defendants have not, as yet, paid the sum of money above demanded, or any part thereof, to the said plaintiff; but they to do this, have hitherto wholly refused, and still do refuse to do to the damage of the said plaintiff fifty dollars, and therefore he brings this suit, etc.

The defendant Scott pleaded *nil debet* and payment, upon which issues were joined. Trial was had by the court, a jury being waived, at October term, 1867, and judgment for the plaintiff.

There was a demurrer to the declaration, which was overruled.

On the trial the plaintiff offered the note and protest in evidence, to which the defendant objected and moved to exclude it, because the plaintiff had declared on a joint note, and the note offered in evidence was the note of the Blannerhassett Oil Co., and because there was a variance between the declaration and the evidence offered to support it, but the court overruled the motion and the defendants excepted.

The defendant Scott brought the case to this court.

LEE & HUTCHINSON, for the plaintiff in error.

This was an action of debt by J. W. Baker against the plaintiff in error, founded on a certain promissory note, fully set out in the bill of exceptions.

The note was declared on as the individual note of the defendants Scott and Horner, but on its face it shows that it was the note of a corporation called the "Blannerhassett Oil Company." There was no controversy about the existence of the corporation, which was formed under the laws of this State.

We insist upon the following points for the plaintiff in error, which we think clearly manifest the error of the court below in its judgment in this case, viz.: Courts have always construed commercial instruments liberally, for the purpose of encouraging trade, and to meet, as far as possible, the ordinary exigencies of business, etc. In furtherance of this policy, if it can, upon the whole instrument, be collected that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, *however informally it may be expressed:* Story on Prom. Notes, Sec. 69; Story on Agency, Sec. 154; *Pents* v. *Stanton*, 10 Wend. 271; *Mechanics Bank* v. *Bank of Columbia*, 5. Wheat. 326; *Long* v. *Colburn*, 11 Mass. 97.

Whether the contract is binding on the agent or the corporation, is a question to be solved by the intent which may be discovered in the form and circumstances in which it is made: Angell & Ames on Corp., Sec. 294; *Conro* v. *Port Henry Iron Co.*, 12 Barb. 27.

Parol evidence is admissible to show who intended to be bound in every case, except where the instrument is without ambiguity and asserts a positive liability on the person contracting, the name of the principal not appearing: 1 Am. Leading Cases, 629; *Mechanics Bank* v. *Bank of Columbia*, 5 Wheat. 326; *Bank of Utica* v. *Magher*, 18 Johns. 341.

Agents of corporations and their acts are governed by the same rules in commercial transactions, in general, as agents of individuals: Angell & Ames on Corp., Sec. 283, 284; *Legrand* v. *Hampton and Sidney College*, 5 Munf. 324. By no means essential that corporate name be used in drafts: *Conro* v. *Port Henry Iron Co.*, 12 Barb. 53.

The authority of an agent to bind a corporation need not be shown by a resolution or other written evidence, but may be implied from acts and circumstances: Angell and Ames on Corp., Sec. 284; *North Cen. R. Co.* v. *Bastian*, 15 Maryland, 494.

If the agent contract for a corporation within the scope of his power, the corporation is bound, though the name of "corporation not disclosed": Angell and Ames on Corp., Sec. 294 and note 4. In general, if from the contract itself or from this coupled with the conduct of the parties thereto, it appears that credit was given to the corporation and not to the agent, and that it was the intent the corporation should be bound, whatever the form of the contract, the corporation only will be held liable upon it: Angell and Ames, Sec. 296.

Whatever the form or manner of the signature of a *simple contract*, it will be held to bind the principal if that were the obvious intent: Pars. Merc. Law, 145; *Wilks* v. *Back*, 2 East, 142; Angell and Ames, 293, 294.

The following cases clearly establish the validity of the note in this case as the contract of the corporation: *Long* v. *Colburn*, 11 Mass. 97; *Ex parte Buckley*, 14 Meeson & Welsby, 469; *Rice* v. *Gove*, 22 Pick. 158; *Emerson* v. *Prov. Hat M. Co.*, 12 Mass. 237; *Mann* v. *Chandler*, 9 Mass. 335;

Mott v. *Hicks*, 1 Cowen, 513; *Randall* v. *Van Vechten*, 19 Johns. 60; *Dubais* v. *Del. Hed. Cannel Co.*, 4 Wend. 285; *Many* v. *Beekman Iron Co.*, 9 Paige, 188; *Evans* v. *Wells*, 22 Wend. 325; *Lozums* v. *Shearer*, 2 Alabama, 718; *Bowen* v. *Morris*, 2 Taunt. 374.

In the case of *Many* v. *Beekman Iron Co.*, 9 Paige, 188, the agents, Conklin and Hewitt, made a contract with the complainant commencing thus, "We hereby agree to sell, etc.," and was signed by them as agents for the Beekman Iron Co. The chancellor (Walworth) held "that in a contract made by agents of a corporation, not under seal, it is sufficient to bind the corporation, if it appear upon the contract that the agents who signed intended to contract for the corporation as such agents and not for themselves as individuals."

We think this case is decidedly in point, and with the others cited, equally applicable, we submit the question.

The note should have been excluded from going in evidence to the jury, because of the additional variance from that described in the declaration, in this, that a note payable in two months after date is not the same as a note payable in sixty days after date.

SANDS & WILSON, for the defendant in error.

MAXWELL, J.—This was an action of debt to recover from William Scott and Willian H. Horner the sum of $342.00, the amount of a promissory note alleged in the declaration to have been made by the defendants on the 19th day of December, 1866, payable two months after the date thereof, at the Second National Bank of Parkersburg.

The case was matured against the defendant Scott, who appeared and demurred to the declaration and filed the plea of *nil debet*, and also the plea of payment, on which issues were joined. The demurrer was overruled, and the court, in lieu of a jury, proceeded to try the issues. The plaintiff offered in evidence on the trial, as the foundation of his action, the following paper:

$342.25. December 19, 1866.

Sixty days after date we promise to pay to the order of J.

W. Baker, three hundred and forty-two 25-100 dollars, at Second National Bank of Parkersburg, value received.

WILLIAM SCOTT,
President Blannerhassett Oil Co.
W. H. HORNER,
Treasurer.

Indorsed W. H. Horner, Treasurer.
J. W. Baker.

And accompanied the said note with the protest thereof. To the admission of which the defendant objected and moved the court to exclude the same, because the plaintiff declared on a certain joint note, made by the defendant, and the note and protest offered in evidence were the note and protest of the Blannerhassett Oil Company, the same having been made and signed by the said William Scott, as president of said Blannerhassett Oil Company, and by the said Horner as treasurer of the same company, and because there was a variance between the declaration and the evidence offered; but the court allowed the note and protest to be given in evidence and rendered judgment for the plaintiff for the amount of the note and charges of protest thereon. There was nothing in the demurrer and the same was very properly overruled.

The petitioner insists that the court erred in overruling the motion to exclude the note because of the variance between it and the declaration. First, because a note payable sixty days after date is not the same as a note payable two months after date. Second, because the note on which the action was founded, was, as appears from the declaration, a joint promise of the petitioner Scott and the said William H. Horner, whereas the note given in evidence was the note of the Blannerhassett Oil Company, as appears on its face. There is a plain variance between the note given in evidence and the declaration in two respects. The note is described in the declaration as a note for "three hundred and forty-two dollars" payable "two months after the date thereof," while the note given in evidence is for "three hundred and forty-two 25-100 dollars" payable "sixty days after date." This it seems to me, was a fatal variance, and the note should have been excluded, the plea of *nil debet* making it necessary that the note produced in evidence should correspond with that described in the declaration.

On the other ground claimed—that the note given in evidence is the note of the Blannerhassett Oil Company and not the note of Scott and Horner, there is no variance between the declaration and the note, because the note given in evidence is plainly the note of William Scott and W. H. Horner.

There is nothing about the note that indicates, in the slightest degree, that it is the note of the Blannerhassett Oil Company or that it is intended to be such. The president and treasurer, together or separately, may have had authority to make the notes of the company, but in this instance the note is not executed for the company or in the name of the company, and the addition of president and treasurer to their names can not have the effect to make it the note of the company.

In the case of *Baker* v. *Mechanic Fire Ins. Co.*, 3 Wend. 94, it was held that a note either in the following form: "I, John Franklin, president of the Mechanic Fire Insurance Company, promise to pay to the order of the president and directors of the Life and Fire Insurance Company, on demand, the sum of 3,172 dollars and 40 cents, with interest, for value received. John Franklin"; or in the form following: "I promise to pay to the order of the president and directors of the Life and Fire Insurance Company, on demand, the sum of 3,172 dollars and 40 cents with interest, for value received. John Franklin, president of the Mechanic Fire Insurance Company," was not the note of the company or binding upon it.

In the case of *Macbean* v. *Morrison*, 1 A. K. Marshall, 545, a note in the following form:

$559 24-100. LEXINGTON, 9th March, 1814.

On the 8th of April, next, I promise to pay James Morrison, or order, five hundred and fifty-nine dollars 24-100, for value received, of Nicholas Smith, being on account of his wages at the Madison Hemp and Flax Spinning Company Manufactory, in Madison county, for the Madison Hemp and Flax Company.

W. MACBEAN, Pres.

was held to be the note of Macbean for which he was held individually liable.

In the case of *Hills* v. *Bannister & Butler*, 8 Cowen, 31, Hills brought an action of assumpsit on a promissory note,

executed by Bannister & Butler, with the addition to their names of "Trustees of Union Religious Society, Phelps," which was a corporation, and the defendants were held personally liable.

In the case of *Bradlee et al.* v. *Boston Glass Manufactory*, 16 Pick. 347, the plaintiff brought an action of assumpsit against the Glass Manufactory on the following promissory note:

BOSTON, 13 January, 1823. For value received, we, the subscribers, jointly and severally, promise to pay Miss Jane T. Bradler, or order, for the Boston Glass Manufactory, thirty-five hundred dollars, on demand with interest.

JONATHAN HUNNEWELL,
SAMUEL GESE,
CHARLES F. KUPFER.

and it was held that this was the promissory note of the three makers and not of the company.

The case of *Taft* v. *Brewster and others*, 9 Johns. 334, was an action brought against Brewster, Loomis & Coats, on a bond, dated the 16th of April, 1810, by which the defendants, "by the name and description of Jacob Brewster, Thaddeus Loomis and Joseph Coats, trustees of the Baptist society of the town of Richfield," acknowledged themselves bound to the plaintiff in the sum of 3,600 dollars, to be paid, etc., conditioned that if the defendants, as trustees of the Baptist society of the town of Richfield, their heirs, etc., should pay the plaintiff the sum of $1,800, with interest at the several times therein mentioned, etc. The bond was signed "Jacob Brewster, Thaddeus Loomis and Joseph Coats, trustees of the Baptist society of the town of Richfield," and sealed by them respectively. The bond was considered as given by the defendants in their individual capacities.

More cases of the same import might be added, but they are uniform and it is useless to multiply them.

The case will have to be reversed, however, for the error committed in receiving the note in evidence, because of its variance from the declaration before pointed out, at the costs of the defendants in error, and the cause remanded for further proceedings to be had therein.

The other judges concurred.

Judgment reversed.

GERBER v. STUART ET AL.

(1 Montana, 172. Supreme Court, 1870.)

Official signature—Intention—Name in parol contract. Action against James Stuart upon a promissory note signed "Jas. Stuart, Gen. Mang. and Supt. St. L. & M. M. Co." *Held*, that Stuart might show *aliunde* that it was intended by the parties to express that he acted as agent, and that the consideration moved to his principal. *Held*, also, that the name of the principal need not appear in the body of a parol contract.

Appeal from the District Court of Lewis and Clark County, Third Judicial District.

Gerber commenced this action against Sanders and Stuart, upon a promissory note, on June 25, 1869. Stuart filed a separate answer on July 12, 1869. On motion of the plaintiff, the court, WARREN, J., struck out parts of this answer. On July 16th, Stuart filed his amended answer. On motion of the plaintiff, the court ordered parts of the same to be struck out. On July 19th, Stuart filed his second amended answer. The plaintiff then moved to strike this answer from the files, and assigned among other reasons therefor, that the answer was sham and irrelevant and no defense. The court sustained the motion and rendered judgment for plaintiff for $5,481, and Stuart appealed.

The pleadings are contained in the opinion.

WOOLFOLK & TOOLE, for appellants.

SHOBER & LOWRY, for respondent.

SYMES, J.

This was an action on a promissory note by plaintiff, assignee, against the defendants, makers. The cause was tried before the Third Judicial District Court, for Lewis and Clark county, at the July term, 1869, and judgment rendered on the pleadings after the separate amended answer of James Stuart was stricken from the files, and appeal taken from the judgment roll.

The question presented is, whether the new matter set up in the answer and amended answer, which was stricken from the files, if proved, would constitute a legal defense.

The complaint declared on the note in the usual form, setting out a copy as follows, to wit:

$4,300.

PHILLIPPSBURG, DEER LODGE COUNTY, MONTANA TERRITORY, *August* 31, 1868.

Thirty days after date, for value received, I promise to pay Donald Chrisholm or order, at Phillippsburg, the sum of forty-three hundred dollars, with interest at the rate of five per cent. per month until paid.

COLE SANDERS,
JAMES STUART.

{$2.80 U. S. stamp duly canceled.}

Gen. Manag. and Supt. St. Lo. & M. M. Co.

Indorsed: Donald Chrisholm, November 4, 1868.

And alleged that on the 4th of November, 1868, said Donald Chrisholm transferred and delivered said note, duly indorsed, to plaintiff, who was owner and holder thereof; that no part had been paid except the sum of $784, and demanded judgment for $5,484 and costs.

The separate and amended answer of defendant Stuart contains a general denial, and sets up that at the time of the execution of the note he was "general manager and superintendent of the St. Louis and Montana Mining Company," a corporation created by the laws of the State of Missouri; that he executed said note in his said capacity of "general manager and superintendent of the St. Louis and Montana Mining Company;" that it was expressly agreed between the said Donald Chrisholm and this defendant, at the time of the execution of said note, that defendant was not to be personally responsible thereon; that he executed the note simply as agent for said mining company; that the intent and design of defendant in signing said note, as "general manager and superintendent of the St. Louis and Montana Mining Company," was to bind the said company, as principal in said note, jointly with said Sanders, but in no way to bind himself; and that such intent and design was expressed at the time of the execution of the said note to said Chrisholm, who accepted said note, so signed, with

full knowledge of such intent and design; that the object of defendant, in signing said note, was to carry out said intention of the parties, and to bind his said principal, and that defendant, knowing that it was necessary to put his signature to said note, should indicate that he signed the same, in his capacity as manager and superintendent for said St. Louis and Montana Mining Company, in order to bind the said principal, by inadvertence and mistake omitted the word "as" before the words "manager and superintendent;" also, the word "for" after the word "superintendent," which was the way he intended it to be. Further, that if defendant is not allowed to show his mistake it will operate as a fraud, and violate the intent and design of all parties to the note; that he had no personal interest in the consideration for which said note was given; that it was given for mining property purchased from said Chrisholm, and the design was to benefit said mining company by acquiring an interest for them in the mining ground jointly with said Sanders; that defendant, as manager and superintendent of said company, had often exercised similar authority for the benefit of said company, which had been ratified by them, and had full authority to bind said company by said signature; and that plaintiff knew of the aforesaid agreement between Chrisholm and defendant, and holds the note subject to all the rights and equities of defendant.

Does the allegation of the answer set up a legal defense on the part of defendant Stuart, to the notes, and, if so, will the law allow him to show it, or will it conclusively presume an absolute liability from the face of the note, and not allow defendant to prove any other? This depends on whether the addition to the defendant Stuart's name of "general manager and superintendent of the St. Louis and Montana Mining Company," shall be taken conclusively as *descriptio personæ*, or whether he will be allowed to explain the addition, and to show *aliunde*, that it was intended by the parties to express that he acted as agent, and that the consideration moved to his principal under circumstances which release the agent from personal liability. While there appears, on examination of the authorities, especially the older ones, that the addition to a signature of "agent," "president," "superintend-

ent" and similar words have been held to be mere descriptions of the person, and not of the capacity in which the party acted; the modern rule seems to be that if from the whole instrument it appears that the party intended to act for and bind his principal, the principal and not the agent will be bound; and that where the addition or description is so inartificially expressed as to leave it in doubt, or ambiguous, from the face of the instrument, evidence *aliunde* will be admitted to explain and show the actual intention of the parties. Parsons, after citing numerous cases, some of which appear contradictory, says, that the recent cases and the best reasons for determining in each instance, and with whatever technical inaccuracy the signature is made, whether a party is a principal or an agent, is from the facts and the evidence to show the intention of the parties to the contract: 1 Pars. on Cont. 54, 57; 1 Pars. on Bills, 167 and note; Story on Prom. Notes, 70. We find that in the difficult cases decided the instructions of the court are the foundation of the decisions, showing that where it was doubtful the cases have been submitted to juries: *Sayre* v. *Nichols*, 7 Cal. 535; 5 Cush. 158.

In sealed instruments the name of the principal must appear in the body of them; but this is not required of parol contracts. Perhaps the weight of authority is that where a party signs his name to a contract with only the addition of "agent," "manager," etc., that he will be held personally liable if he does not disclose the name of his principal, although the case in 7 California and some others lean to the contrary; this case does not come within that principle. The party sued on in this action does not sign his name merely with the addition of "agent," "manager," or "superintendent," without disclosing the name of any other person, but signs his name and adds "Manager and Superintendent of the St. Louis and Montana Mining Company," disclosing the full name of a known mining corporation. We are not called upon to decide whether the note herein presents a *prima facie* case against defendant, but whether on its face it shows such a conclusive personal liability against defendant as will estop him from setting up in his answer and proving the real situation, knowledge and intention of the parties at the time of the execution. Story, in his work on Agency, says that it is

often difficult to determine from the face of an instrument whether or not an agent is personally liable, and that it is impossible to reconcile all the cases. He cites one case as follows: "I promise to pay," etc., and is signed "A B" for "C D" (the principal), and says in this case it was held the agent was not personally liable; and adds in a note to cases cited, that the liability in many cases depends on the state of facts shown to exist at the time the contract was made, and sometimes to whom the credit was given: Story on Agency, (Redfield's ed.), 346, 351.

Testing this case by these principles, we think the court below erred in striking out that portion of the amended answer which alleged that the payee in the note knew at the time of its execution that he acted as agent of the mining company; that it was the intention of all parties that the mining corporation, and not the agent, should be liable thereon; that the payee gave the credit to the principal and not to defendant; and that the contract was made for the benefit of and the consideration moved to, the principal—said mining company. And the note being transferred to plaintiff after it had become due, this defense is good against him.

If two persons sign a note as principals without anything on the face to show that one intended to sign as surety, still it may be shown *aliunde*, as between the payees, that one intended to become liable only collaterally as surety; and if the word "surety" is added to the signature it will be presumed *prima facie* from the face: 2 Smith's Lead. Cas. 380. Then will it be contended that where a party signs a contract with the addition of "Manager and Superintendent of the St. Louis and Montana Mining Company," that the law will not only *prima facie* hold him liable personally from the face of the contract, but will conclusively presume him absolutely liable and not allow him to set up and prove the real facts and intention of the parties at the time the contract was executed. We think it would be in opposition to the established principles of our modern commercial law.

Judgment reversed and cause remanded.

Exceptions sustained.

PEDDIE V. DONNELLY.

(1 Colorado, 421. Supreme Court, 1872.)

Pleading—Variance. A variance between a note and the allegations descriptive thereof may be taken advantage of under the plea of *non est factum;* but in declaring upon a note signed by two parties, it is no variance to aver that the defendants—*the said Abram D. Bevan, by the name and style of A. D. Bevan,* made their certain writing obligatory, the words in Italics being read as if in parentheses.

Parol evidence affecting writing—Plea. A plea to a *debt* upon a note, setting up the fact that the note was given for money borrowed by the maker to enable him to procure sale of plaintiff's mining property to be repaid in case of sale, and not until sale, the plea not stating that such contemporaneous agreement was in writing, presents no defense.

Error to Probate Court, Jefferson County.

The first plea of defendant Peddie was *non est factum*, verified by the oath of the defendant. In his second plea defendant Peddie alleged that the action was brought on the note described in the declaration only, and that the note was given by defendant Bevan and himself for money borrowed by Bevan to enable him to go to St. Louis to sell mining property belonging to the plaintiff, and that it was agreed between plaintiff, Bevan and himself, at the time the money was borrowed, that the same should be repaid out of the proceeds of the sale of the said mining property, and that said sum of money should not be repaid until Bevan sold the property, which event had not occurred. It was not alleged that this agreement was in writing.

The promissory note given in evidence was as follows:

"BRECKENRIDGE, COLORADO TER'RY, Oct. 3, 1868.

"Four months after date we, or either of us, promise to pay to Charles Donnelly, or order, the sum of ($300) three hundred dollars, lawful money, for value received, with interest at the rate of three per cent. per month until paid.

"A. D. BEVAN. [L. S.]

"ANDREW PEDDIE. [L. S.]"

The court below gave judgment for the plaintiff.

GEORGE W. PURKINS, for plaintiff in error.

MILLER & MARKHAM, for defendant in error.

WELLS, J.

We agree with counsel for the plaintiff in error that the plea of *non est factum* was sufficient to give advantage of any variance between the obligation counted upon and the allegations descriptive thereof, but we are not able to agree that the alleged variance exists in this case. The count avers that "the defendants heretofore, to wit, on, etc., at, etc., the said Abram D. Bevan, by the name and style of A. D. Bevan, made their certain writing obligatory," and out of the words "the said Abram D. Bevan, by the name and style of A. D. Bevan," it is argued the variance arises; for it is said hereby it appears that the obligation was on its face the deed of Bevan only, whereas that offered in evidence was subscribed and sealed by both the defendants. It appears to us, however, that the words of the declaration last quoted are to be read as if written in parenthesis, importing description of the manner in which the defendant Bevan executed the writing, and not as contradicting what is also alleged, that the defendants made their writing obligatory."

And this disposes of the objection that the demurrer to the special plea interposed in the court below should have been sustained to the first count of the declaration. There was no substantial defect in that count to which the demurrer could have been extended. The only question remaining is, as to the sufficiency of the special plea.

If this were a new question we might be inclined to doubt whether the language of the plea ought not to be construed as importing that the supplemental undertaking upon which the defendant relies was, as the law requires, in order that it should be effectual, in writing; for, though it appears to be well settled that a promise in writing, absolute, may not, by parol, be turned into a promise upon condition (*Hoare* v. *Graham*, 3 Camp. 57; *Nausen* v. *Walker*, 1 Stark. 361; *Free* v. *Hawkins*, 8 Taunt. 92; *Woodbridge* v. *Spooner*, 3 Barn. & Ald. 233; *Moseley* v. *Hanford*, 10 B. & C. 729; *Brown* v. *Langley*, 4 M. & Gr. 473), yet this seems to be rather a rule of evidence than of pleading, and the defendant having set forth an agreement which, if established, will bar the plaintiff of

his present action, it would seem that this ought to suffice, although he has not shown by what manner of evidence he will sustain his plea.

Nevertheless it has uniformly been held, so far as the authorities have come to our notice, that, if plaintiff count upon a writing, and the plea show an agreement contemporaneous and modifying its terms, it must show that this agreement also was in writing: *Mease, Executor*, v. *Mease*, 1 Cowp. 47; *Wells* v. *Baldwin*, 18 Johns. 46; *Miller* v. *Wells*, 46 Ill. 49. And, if it fail in this, plaintiff may demur generally.

The judgment of the probate court is therefore affirmed.

Affirmed.

KIMMINS, FOR USE, v. WILSON.

(8 West Virginia, 584. Supreme Court of Appeals, 1875.)

Presumptions in favor of verdict. On a motion for new trial, because the verdict is contrary to the evidence, the evidence being conflicting, all inferences from the testimony which the jury might, without error, have drawn, are to be accepted in favor of the verdict, and the conflicting testimony and the inferences therefrom are to be discarded.

Subscription contract. A subscription paper signed with the number and amounts of shares attached to the signatures is in effect a promise by each to pay the others; the promises are a sufficient consideration, one for the other, and the parties are sufficiently definite.

Note for subscription. Such contract is a sufficient consideration for a note made by one of the subscribers promising to pay the amount specified to the treasurer of the organization.

False representations by one subscriber. Where one of such subscribers has made false representations to another of such subscribers, the others are not bound by such representations, and the contract is not invalidated as between the party deceived and the others.

Opinions. Expressions of opinion distinguished from material representations.

Refusal of nominal plaintiff to authorize suit. The fact that the nominal plaintiff, who sues for the use of another, testifies on the trial that he did not allow the use of his name, can not prevent a recovery.

SUPERSEDEAS to a judgment of the Circuit Court of Mar-

shall County, rendered on the 12th day of October, 1872, in a suit then pending in said court between Abner R. Kimmins, who sued for the use of George W. Richmond, plaintiff, and James T. Wilson, defendant. The *supersedeas* was awarded on the petition of the defendant below. The other material facts appear in the opinion of the court.

The Hon. THAYER MELVIN, Judge of said Circuit Court, presided at the trial below

R. C. HOLLIDAY, for the appellant.

J. L. PARKINSON and J. DALLAS EWING, for the appellee.

HOFFMAN, Judge.

A. R. Kimmins suing for the use of George W. Richmond on the 21st day of March, 1871, instituted his action of debt in the Circuit Court of Marshall County, and afterward filed his declaration, in which he demanded $335, which he alleged that Wilson owed him, and alleged that on the 8th day of September, 1866, Wilson made his note in writing, by which he promised, on or before the first day of October in the same year, to pay to Kimmins the sum first mentioned, for value received; but that Wilson had not done so.

Wilson pleaded *firstly*, that he was not indebted; he pleaded *secondly*, that in August, 1866, Isaac Richmond and his brother, George W. Richmond, were actively engaged in getting up an organization called the Dallas Oil Company, to operate in the oil business in Wood County, West Virginia; that Isaac Richmond presented to Wilson an oil lease, or article of agreement, which recited substantially what follows: "The undersigned agree to become stockholders in a property located on White Oak, close to the Great Hope, Barles and other wells. This lot is well located for boring purposes, and contains over one and a half acres. It has a good ten horse power portable engine, engine house and shanty furnished, lot of boring tools, blacksmith tools, 500 feet of tubing with pump and well 382 feet, with a thirty barrel tank, with several barrels of oil. The machinery, well, all in good condition; the lease runs for fifteen years. The whole stock is divided into twenty shares of equal value; each share

is put at a cost of three hundred and thirty-five dollars ($335) per share. Should the company elect to bore another well, it is hereby understood that Blair & Gibbens are not to be assessed in pumping the oil, and in all other expenses they bear their proportion of the expenses.

"We can take this property and *stock* it at pleasure, for a sum vastly exceeding this cost. Money is to be paid when subscribed;" That Isaac Richmond stated to Wilson that the well was a thirty barrel well, that he had seen it run a thirty barrel tank full per day, and he solicited Wilson to go into the oil lease business, but Wilson refused to do so, till Isaac Richmond told him, that if he did go into the business, he should not lose anything, that the law required them to make up a full company; that he, Richmond, wanted Wilson's name to help fill up the company; that it was understood that Wilson had not money in hand to the amount of any material part of the shares. And that Wilson relying upon Isaac Richmond's representations as true, not himself having money, made and signed the note to Kimmins who was the secretary of the Dallas Oil Company, then organized (notes being required to be given, when money was not paid for shares), for one share of stock so taken. That Wilson was induced to enter into the contract and make the note, by reason of Isaac Richmond's representations; and that these were all false; that Kimmins and George W. Richmond were long ago advised of the foregoing facts; and that there was a total want and failure of the conditions of the contract to the full amount of the note, as of the time when it was made, and always since; for that the well was not a thirty barrel well, that it had never run a thirty barrel tank full in a day, but that it was almost a total failure and wholly worthless; and that the implements were of no value otherwise than in a good oil well; and Wilson pleaded *thirdly*, inserting instead of the name of Isaac Richmond, that of George W. Richmond, otherwise substantially the same facts as in the second plea.

Each of the last two pleas was verified by the affidavit of Wilson that the matters set forth in the plea were true, as to his knowledge, information and belief. To each of the three pleas Kimmins replied generally.

There was a trial before a jury and a verdict for Kimmins

for the use of G. W. Richmond. Wilson moved for a new trial, which was refused, and he excepted, and the facts in part, and evidence in part, were certified.

As appears by the record, the agreement recited in the second plea was signed by Blair & Gibbens, with four shares, of the aggregate value of $1,340, written opposite their names and by George W. Richmond, Isaac Richmond, A. R. Kimmins, James T. Wilson, Daniel Dague and eight other persons, with one share of the value of $335, written opposite the name of each.

The evidence proves the following facts:

G. W. Richmond, who resided in Clarksburg, West Virginia, arranged with Blair & Gibbens, with reference to the lease mentioned in the agreement, and with a firm which, under a contract with Blair & Gibbens, had sunk the well then in operation and owned the property, for the purchase of their interest, engine and other property mentioned in the agreement, upon the condition that at or before the expiration of sixty days, a company should be formed to take the lease and other property upon the terms suggested. The price of the lease does not clearly appear; but the price asked for the well, engine and other property was $3,500. The agreement was signed by Blair & Gibbens, who took four shares of stock, and by George W. Richmond who took one share; and then it was sent by George W. Richmond to his brother, Isaac Richmond, in Marshall county, with the request that, if he had the time, he would obtain the desired number of subscribers; or if not that he would hand the papers to some one in his neighborhood who would attend to it. A sufficient number of subscribers having been secured on the 6th day of September, 1866, the company was formed and organized—called the Dallas Oil Company—and Dague was elected president, and Kimmins, secretary and treasurer. A part of the subscribers paid their subscriptions before the organization; but, under an agreement with the other parties on the same day, Wilson and some others made their note to Kimmins for their respective subscriptions.

According to the original understanding of the parties, after the organization, at the instance of the company, Dague, the president, and Isaac Richmond went to the premises and

afterward directed George W. Richmond to close the contract with the owners of the land and property; and he did so.

They paid $1,500, and executed their note for $2,000 for the engine, fixtures, etc., and G. W. Richmond paid $1,000 and executed his note for the residue of the amount payable on the lease; and Blair & Gibbens made the title to the company, and, with the understanding on Richmond's part that the notes for unpaid subscriptions should be turned over to him, he paid the amount of that note. The testimony of George W. Richmond is that Wilson agreed with him that if he would advance the amount of William's subscription, the latter would pay to Richmond the amount of his note for $335—though there was testimony tending to contradict this.

The evidence proves that this note with others was afterward turned over by Kimmins, as secretary and treasurer of the company, to George W. Richmond, for whose use it was understood the money was to be paid. Assessments were twice made for $10, for working purposes, and paid. Kimmins and George W. Richmond were elected superintendents and acted as such in boring and operating the well.

The well, premises, fixtures, etc., were at the time of the formation of the company and subsequently, in the condition described in the agreement. There were, in the immediate vicinity of the property wells producing oil; and, in the opinion of witnesses, it was good oil territory and at the price given was cheap. But it turned out that the well worked by the company produced but little oil, and that was of inferior quality. The investment was found to be unremunerative, and after about a month the well was abandoned and the fixtures left upon the premises.

Isaac Richmond represented to Wilson that he had seen thirty barrels of oil pumped from the well in twelve hours; that the oil was of superior quality and that the well was a paying one; and that the money payable by the note given by Wilson could be made out of the oil before payment would be required.

The testimony of George W. Richmond was that Isaac Richmond was not his agent, though there was evidence tending to prove that he was such.

On the trial Kimmins testified that Wilson never received

any consideration from him for the note; that it was executed to him as secretary and treasurer of the company; that the legal title was not in him, and that he had not ordered this suit to be brought.

As there was no demurrer to the second and third pleas, and neither was entirely proven, it is sufficient to examine the evidence within the scope of the pleadings, and consider the facts which it proves or is sufficient to prove. But where there is inconsistency, the testimony, and all the inferences from it which might be drawn by a jury, without error, that tend to sustain the verdict, should be accepted, and such of the testimony as directly and irreconcilably conflicted with the former, should be discarded.

It is urged on behalf of Wilson, that as there was no promisee named in the original agreement signed by him and others, that agreement furnished no consideration; and Kimmins paid no consideration for the note made by Wilson to him as trustee and treasurer; and that, therefore, Kimmins could not maintain an action thereon for the benefit of himself or the company or George W. Richmond; that if the consideration were sufficient, Isaac Richmond's representations to Wilson were false and vitiated the contract; and finally, that the suit was not authorized by Kimmins and could not be brought in his name by George W. Richmond.

By the original agreement, signed by the parties, each, in effect, promised to the others to pay for the benefit of all, the sums of money stated after their names. These mutual promises constituted a valid consideration, the one for the other; and the contract was binding, whether it might be enforced in law or only in equity: SEWELL, C. J., in *Phillips Limerick Academy* v. *Davis*, 11 Mass. 117; *Mirick* v. *French*, 2 Gray, 420; *George* v. *Harris*, 4 N. Hamp. 533; *M'Auley* v. *Billenger*, 20 Johns. (N. Y.) 89; *Reformed Protestant Dutch Church* v. *Brown*, 29 Barb. (N. Y.) 335; *McDonald* v. *Gray*, 11 Iowa, 508.

In order to carry the initiatory contract into effect, the parties thereto met and organized themselves as the Dallas Oil Company, a private partnership, and appointed Kimmins, the plaintiff, secretary and treasurer. Some of the parties severally paid in hand the amounts they had respectively promised

to pay; and by the agreement of the parties, expressed or implied, Wilson and others severally executed their notes payable to Kimmins for the amounts which they severally had before promised to pay. Doubtless, the parties agreed that these moneys should be held and used by Kimmins, who was secretary and treasurer of the company, for the benefit of all; and Kimmins, expressly or by implication, consented to do so.

The previous liability of Wilson with the agreement of the parties that he should make his note to Kimmins for such purpose, constituted an adequate consideration for the note of Wilson to him for the amount of the liability, and he or the other members of the company, or any other to whom the right was transferred, might bring a suit thereon in the name of Kimmins against Wilson, and recover that amount: *Siter, Price & Co.* v. *McClanachan*, 2 Gratt. 280; *Richeson* v. *Richeson*, 2 Gratt. 497; *Wickham & Goshorn* v. *Lewis, Martin & Co.*, 13 Gratt. 427; *Evans, Trustee*, v. *Greenhow*, 15 Gratt. 153; *Moses* v. *Trice*, 21 Gratt. 556; *Farmington Academy* v. *Allen*, 14 Mass. 172; *Bryant* v. *Goodnow*, 5 Pick. (Mass.) 228; *Trustees, etc., in Hanson* v. *Stetson*, 5 Pick. (Mass.) 506; *Warren* v. *Stearns*, 19 Pick. (Mass.) 73; *Thompson* v. *Page*, 1 Metc. (Mass.) 569; *Steene* v. *Aylesworth*, 18 Conn. 244; *Robertson* v. *March*,[1] 4 Ill. 198; 1 Chit. on Cont., pp. 32, 33, note, etc., and other cases cited on pp. 50, 51, and note 6.

Moreover, according to the agreement of the parties, a large portion of the moneys agreed to be paid was, in fact, paid to the agents of the company, and they paid large sums to the owners of the leased territory, as well as the property purchased, and George W. Richmond himself, in behalf of the company, paid large sums to these owners; and they thereby procured the lease of the territory and transfer of the property, and caused all to be vested in Wilson and the other partners for their own benefit.

Against the testimony of George W. Richmond and the verdict of the jury, it can not be held that Isaac Richmond was in fact the agent of the former. The relation of Isaac Richmond in the negotiation that resulted in the execution of the

[1] 3 Scam. 198.

contract between all the parties, and the organization of the company, was as antagonistic to George W. Richmond as it was to Wilson.

Certainly that relation was not such as to bind others than himself, or to taint the contract with fraud or misrepresentation, as perpetrated by them, actually or constructively. And Isaac Richmond's conduct, only in his own behalf, could not so vitiate the contract made by him with the other parties, as to impair or destroy its validity between them; though, if fraudulent and injurious, it might subject him to the payment of damages: *Miller* v. *Campbell*, 3 A. K. Marsh. (Ky.) 526; 5 Rob. (New) Pr. 571, 593, *et seq.*, and cases cited.

But the material facts set forth in the agreement were true. In the immediate vicinity of the well were other oil producing wells, and in the opinion of witnesses, the territory in question was good oil territory, and cheap at the price paid for it. And most of the representations made by Isaac Richmond to Wilson are not disproved. The only representations that may seem to be erroneous are, that the well then upon the premises was a paying one, and that the oil was superior in quality. [1] This was so manifestly a matter of opinion, that it can not be presumed to have furnished, to any considerable extent, the ground of the action of Wilson; and though he alone testifies on this subject—he does not suggest that Richmond's representations induced his action. The well, however, at the time referred to, when the negotiation was made, may have been such as represented, and yet, soon after, may have failed to produce any but inferior oil, in quantities unremunerative. Beyond these representations there is no evidence of fraud. Under the circumstances they do not invalidate or affect the original contract or the note.

It would seem that the company authorized Kimmins, as their secretary and treasurer, when George W. Richmond should have paid the note for $2,000, executed by Dague, the president, and himself, to transfer the unpaid notes for shares, to Richmond.

He, Richmond, testifies that Wilson expressly agreed that if Richmond would advance the amount of Wilson's subscription—for which he made the note—he would pay the amount.

[1] Compare *Perkins* v. *Rice*, Littell's S. Ca. 218; *Post* RESCISSION.

And Richmond did pay the $2,000, which covered Wilson's subscription; and Kimmins, as secretary and treasurer of the company, did transfer the note to Richmond; and Richmond, in the name of Kimmins, sued Wilson on the note, and Kimmins made no objection thereto.

The testimony of Kimmins, on the trial, that he had not authorized the suit to be brought in his name, could not tend to bar the recovery. If, as between the other members of the company and Richmond, the latter had not the right to the money, Wilson could not, on the trial, without notice, show that fact to prevent a recovery, for the benefit of the person who ought to receive it.

The motion for a new trial was properly overruled, and the judgment of the circuit court was right and is affirmed with damages and costs.

Haymond, President, and Moore, Judge, concurred.

Judgment affirmed.

LAFLIN AND RAND POWDER CO. v. SINSHEIMER.

(48 Maryland, 411. 30 A. R. 472. Court of Appeals, 1877.)

Parol evidence to explain ambiguous acceptance. A bill of exchange was drawn upon "L. Sinsheimer, Baltimore," by the L. F. & M. Co., payable to the order of plaintiffs. The drawee wrote across its face "Nov. 20, 1874, accepted. L. Sinsheimer, Treas. L. F. and Mining Co." *Held*, that parol evidence was admissible to explain whether the acceptance was intended in an individual or official capacity.

Payee of bill—Statute of frauds. The statute of frauds has no application in suits on an acceptance. In a suit by the payee of a bill of exchange against the acceptor, the question as to the consideration between the drawer and acceptor can not be inquired into.

Action on a bill of exchange. The court instructed the jury in accordance with defendant's third prayer, that "if the jury shall find that the plaintiff sold to the Lancaster Furnace and Mining Company the powder stated in the evidence, and delivered the same to be paid for by said company, and that afterward the defendant gave the acceptance sued on for the price of the same, then there is no sufficient evidence to bind him individually under the statute of frauds, and the plaintiff

is not entitled to recover." The other facts appear in the opinion. The defendant had judgment below.

JOHN SCOTT, Jr., for appellant.

L. RAYNER, for appellee.

ROBINSON, J., delivered the opinion of the court.

The appellant sued the appellee as acceptor of the following bill of exchange:

"$728.00. IRONTOWN, Nov. 18, 1874.

"Sixty days after sight, pay to the order of Laflin and Rand Powder Co. seven hundred and twenty-eight dollars, value received, and charge to account of

"LANCASTER FURNACE AND M. Co.,

"To L. SINSHEIMER, per S. J. A., Jan. 20.

"Baltimore."

Written across its face, "Nov. 20, 1874. Accepted, L. Sinsheimer, Treas. L. F. & Mining Co."

It is insisted that the bill on its face imports a personal liability of the appellee as acceptor; and that parol evidence is inadmissible either to prove that it was accepted by him in his official character as treasurer of the corporation, and for a debt due by it to the plaintiff, or to prove other facts and circumstances with a view of determining the personal liability of the appellee.

The construction of written instruments, signed by persons describing themselves as agents or as officers of corporations, has been a fruitful source of litigation, and the decisions are conflicting and in many cases unsatisfactory. Not that there seems to be any difficulty in regard to the rules of law which ought to govern in the interpretation of contracts, but in the application of such rules to each particular case. The subject is fully considered by Parsons on Notes and Bills, Story on Promissory Notes, Byles on Bills of Exchange; and we do not propose to examine in detail the many cases referred to by these writers, nor attempt the fruitless task of reconciling conflicting decisions.

After all, the question whether one signing a note or accepting a bill as an officer of a corporation, means to bind himself

personally, is a question of intention between the parties to the instrument; and this intention, we admit, as a general rule, must be determined by the face of the paper itself. Where one having authority accepts a bill in such a manner as manifests an intention not to bind himself, but to bind a corporation of which he is an officer, and to be paid out of the funds of the corporation, it is clear in such a case, the acceptance will not bind him personally.

But cases frequently occur, owing to the almost infinite variety in forms of expression and in the use of words, in which it is difficult to determine from the face of the paper itself, whether the party signing means to bind himself, and adds his official character merely for the purpose of indicating the character in which he acts, or whether the official character is added for the purpose of showing he does a mere ministerial act; and that the promise is made and the obligation incurred for and in behalf of the corporation. In other words, does he in the language of the court in *Bradlee* v. *Boston Glass Co.*, 16 Pick. 347, "Apply the executing hand as the instrument of another; or the promising and engaging mind of a contracting party." In such cases where there is such ambiguity on the face of the paper as to be consistent with either construction, whether one means to bind himself personally, or acts only in an official capacity, parol evidence is clearly admissible, to prove the circumstances under which the contract was made; or in other words, to prove the true nature of the transaction: *Haile et al.* v. *Pierce*, 32 Md. 330; 1 Amr. Lead. Cas. marg. 633, notes to *Rathbon* v. *Budling* and *Pentz* v. *Stanton*.

Parol evidence in such cases does not contradict, alter or add to the written instrument, but explains the intention of the parties, which could not be ascertained with any degree of certainty from the face of the instrument itself.

The question then in this case is whether there is any such ambiguity on the face of this bill and acceptance, as to make parol evidence admissible to prove the circumstances under which it was accepted. Here is a bill of exchange drawn by a corporation on the appellee in his individual capacity, to pay a certain sum of money to the appellant. It is returned accepted by him as treasurer of the Lancaster Furnace and Mining Company.

Now, if it had been drawn on him as treasurer, and so accepted, it certainly might be contended that the acceptance did not bind him personally.

But, it is said, having been drawn on him *individually*, he was bound to accept according to the tenor of the bill, or disclaim all personal liability by his acceptance. To this, however, it may be replied that it was in the power of the appellant as payee to insist upon an absolute and unqualified acceptance, and upon the refusal of the appellee so to accept, or upon a qualified or conditional acceptance, to have notified the drawer accordingly.

Be that as it may, no one can read this bill and acceptance and say that it necessarily or even clearly imports an agreement on the part of the acceptor to be individually liable, and if it be conceded that it is liable to such a construction, it is equally clear it may be construed as an acceptance by the appellee in his official character as treasurer of the corporation. Being consistent, therefore, with either construction, parol evidence was admissible to prove the circumstances surrounding the transaction for the purpose of enabling the court and jury to determine the respective liabilities of the parties.

In [1]*Mare* v. *Charles*, 5 Ell. & Black. 978, it does not appear that parol evidence was offered to explain the character of the acceptance, and the acceptor was held liable on the ground that where the words of an instrument will reasonably bear an interpretation making it valid, courts will not so construe it as to make it void. Or, as put by COLERIDGE, J., in that case, it ought to be construed "*ut res magis valeat*," and not "*ut res magis pereat.*"

But where the acceptance is so worded as to be ambiguous or susceptible of different constructions, the introduction of parol evidence to explain this ambiguity and the circumstances under which the acceptance was made, does not necessarily render either the acceptance or the bill itself void. The object of the proof in such cases is to determine the question of the personal liability of the acceptor. The evidence, therefore, offered in this case being admissible, if it established the fact that the bill was drawn for materials furnished the Lancaster Furnace and Mining Company, and the appellee was authorized and did in fact accept it as treasurer of the corporation,

[1]Ante, p. 124.

and it was understood between the payee, plaintiff below, and the acceptor, that the latter was not to be liable personally, then the plaintiff was not entitled to recover, and there was no error in granting defendant's first prayer.

The defendant's third prayer, however, was clearly erroneous. The statute of frauds has no application in suits on an acceptance, which, as against the payee, conclusively admits funds of the drawer to be in hand. The drawer and acceptor are the *immediate* parties to the consideration, and if the acceptance be without consideration, the drawer can not recover of the acceptor. But the payee holds a different relation; he is a stranger to the transaction between the drawer and the acceptor, and is therefore in a legal sense a *remote party*. In a suit by him against the acceptor, the question as to the consideration between the drawer and acceptor can not be inquired into. The payee or holder gives value to the drawer, and if he is ignorant of the equities between the drawer and acceptor, he is in the position of a *bona fide indorsee: Robinson* v. *Reynolds*, 2 Q. B. 196; *Raborg* v. *Peyton*, 2 Wheat. 385; *Storer* v. *Logan*, 9 Mass. 60.

For these reasons, the judgment below must be reversed and a new trial awarded.

Judgment reversed and new trial awarded.

THE NEW YORK IRON MINE v. THE CITIZENS BANK.

(44 Michigan, 344. Supreme Court, 1880.)

Burden to prove agency, when denied. In suit on bill of exchange, drawn by an agent, where with the general issue defendant files affidavit denying the execution of the bill, the plaintiff has the burden of proving that it was drawn upon competent authority.

Authority to draw post-dated drafts. The authority of an agent in charge of an iron mine to draw post-dated bills of exchange on his principal will not be presumed from his having so done before without objection, where there was nothing to show that the party relying on his authority knew that fact, and a long interval had passed since it occurred, and the mine had meanwhile become prosperous and better supplied with ready money; and where in the former case the bills were drawn on time, being post-dated only long enough to give the drawee the

benefit of the full period of discount after receiving them, while in the latter they were made payable at sight, and post-dated several weeks for the agent's private advantage.

Notice of equities to holder of draft. Where knowledge of circumstances that would excite suspicion in the mind of a prudent man on becoming the transferee of negotiable paper is not enough to affect the paper in his hands with pre-existing equities, he must have had actual notice of such equities, or, at least, knowledge of such facts and circumstances as would have made his taking the paper with the intention of enforcing it, an act of bad faith.

Advances, in name of principal, for agent's benefit. Parties discounting paper drawn by an agent upon his principal, are bound to act in the light of all facts within their knowledge bearing on his authority, and can not disregard any fact which might lead a prudent man to suspect that the agent is acting in fraud of his principal.

Local usage affecting mercantile law. Local usage can affect the general rules of mercantile and banking law only to a very limited extent, and under circumstances in which the usage must be considered as made by a party a part of his contract.

Post-dated drafts. A post-dated draft purporting to be payable at sight, is, for all the legal purposes of presentment, demand, protest and payment, a draft payable so long after date; but that authority to make time-paper shall be held to cover post-dated paper, their legal effect must not only be the same, but all their incidents so far identical, that both may fairly be supposed to have been in mind when the authority was given.

Peculiarities of post-dated draft—Agent's authority. Authority to an agent to give unusual business paper is not to be construed on technical reasoning, but on the actual intent. A post-dated bill of exchange differs from a bill made payable a corresponding period after it is drawn, in that the time bill may be sent forward meanwhile for acceptance, while the post-dated bill can not, and the drawee can not retain funds to meet it before its date as against other bills previously falling due. An agent's authority to draw bills of exchange payable on time or at sight, does not include authority to draw post-dated bills.

Error to Marquette. Submitted June 15th and 16th. Decided October 13th.

Assumpsit. Defendant brings error. Reversed.

W. P. HEALY and A. B. MAYNARD, for plaintiff in error.

An agent's authority to make one kind of paper does not empower him to make another: 1 Pars. N. & B. (2d ed.) 107; *Tripp* v. *Swanzey Paper Co.*, 13 Pick. 293; *Robinson* v. *Yarrow*, 7 Taunt. 455; *Attwood* v. *Munnings*, 7 B & C. 278; *Wallace* v. *Branch Bank*, 1 Ala. 565; *Union Bank* v.

Mott, 39 Barb. 180; *Mechanics Bank* v. *Schaumburg*, 38 Mo. 236; *Batty* v. *Carswell*, 2 Johns. 48; *The Floyd Acceptances*, 7 Wall. 666; authority to make post-dated drafts can not be implied from the fact that they had been made before without objection under different circumstances: *Beach* v. *Vandewater*, 1 Sandf. 277; *Dickinson* v. *Valpy*, 10 B. & C. 128; the right to draw checks does not carry the power to post-date them: *Foster* v. *Mackreth*, L. R. 2. Exch. 163; post-dated drafts are due on and after the day of their date: *Pasmore* v. *North*, 13 East, 517; *Mohawk Bank* v. *Broderick*, 13 Wend. 134.

DAN. H. BALL and ASHLEY POND, for defendant in error.

Post-dated drafts are not illegitimate or suspicious: 1 Dan. Neg. Inst. 73, 74; 2 Id. 538; Edwards on Bills, 151; *Brewster* v. *McCardell*, 8 Wend. 478; Bills of exchange need not bear any date: Pars. N. & B. 41, 42.

COOLEY, J.

The Citizens Bank is a corporation doing business in Marquette, Michigan, and was organized for that purpose in May, 1871. The New York Iron Mine is a corporation organized under the laws of Michigan in or about the year 1865, for carrying on mining operations near Marquette, but having the business offices of its president, secretary and treasurer in the city of New York. In the circuit court the bank sued the mine to recover the amount of the following bill:

"OFFICE OF THE NEW YORK IRON MINE,
MARQUETTE, Lake Superior, July 5, 1877.

At sight, acceptance waived, pay to order of F. M. Steele, cash, five thousand dollars.

NEW YORK IRON MINE,
By W. L. Wetmore.

$5,000.

To Saml. J. Tilden, Esq., 12 Wall St. N. Y."

The defendant pleaded the general issue, and filed an affidavit denying the execution of the bill. This plea and denial imposed on the plaintiff the necessity of proving that the draft was drawn by Wetmore with competent authority. The

evidence which was given for this purpose is set forth in the bill of exceptions. It appears from this that at the organization of the defendant corporation, Samuel J. Tilden and William L. Wetmore were the principal stockholders, and, after a time, perhaps, the sole stockholders; that Tilden was president and also acted as treasurer, and Wetmore was general agent and manager at the mine; that the directors, besides Tilden, were men in his employ, and the board met but seldom, and the management of financial matters at New York was left exclusively to Mr. Tilden; that Wetmore, while acting as general agent for the mine, was also operating on his own account in company with a brother, under the firm name of Wetmore & Bro., and also as a proprietor in the Bay and Munising Furnace Companies.

As the sales of products of the New York Iron Mine were made under Mr. Tilden's direction, and the moneys received went into his hands at New York, the means of carrying on mining operations were obtained by Wetmore by means of drafts drawn by himself on Mr. Tilden, which were either discounted at Marquette or Negaunee or sent forward for collection. At first these seem to have been principally time drafts, but the mine proved to be very profitable, and after 1872 the drafts were generally at sight. In 1869 four post-dated drafts were drawn by Wetmore, the first of which was drawn seven days before its date, the second four days, the third five days, and the fourth nine days. In each instance Mr. Tilden was advised of the drawing by letter on the day the drafts were made, and it does not appear that any objection was made by him to their being post-dated. The first and fourth were drawn in January and December.

It was shown by Wetmore and not questioned by any one that the draft in suit, together with a large amount of other paper was drawn by Wetmore for his own purposes without the knowledge of Mr. Tilden. The circumstances under which it was taken by the bank are shown by the testimony of Mr. Steele, the cashier of the bank. It appears by his evidence that the following post-dated drafts, purporting to be sight drafts, were drawn by Mr. Wetmore and discounted at the bank; one for $5,000, dated May 6, 1876, discounted April 29th; one for same amount dated August 5, 1876, discounted

July 15th; one for same amount dated November 2, 1876, discounted October 23d; one for same amount dated December 4, 1876, discounted November 8th; one for same amount dated February 8, 1877, discounted January 6th; one for same amount dated March 3, 1877, discounted February 9th; one for same amount dated May 12, 1877, discounted April 9th. All these, when their respective dates arrived, were forwarded to New York and were paid. There is no evidence that Mr. Tilden knew before paying them that any one of them was a post-dated draft, and he testified that he never did. Wetmore also drew and the bank discounted for him May 23, 1877, a draft post-dated June 3d. This was not forwarded, but was taken up by Wetmore June 7th, by another draft post-dated July 3, which the cashier was requested not to forward. The reason assigned by Wetmore for thus taking it up was, that he had had a fire at the Bay Furnace location, which demanded all his attention for the time, and he could not then make up his New York accounts. The draft in suit was discounted by the bank June 16, 1877, post-dated July 5. With this was given a draft dated June 16, 1877, payable July 8, for a like amount, which was considered as collateral. The giving of the collateral draft appears to have been at Wetmore's suggestion, on a supposition, as he explains it, that if he were to die before the date of the principal draft arrived, it would become invalid. Similar collateral time-drafts had been given in other cases where post-dated drafts had been discounted.

In all cases but one in which Wetmore obtained discounts at the bank, on paper purporting to be that of the New York Iron Mine, the money was paid or credited by the bank to him.

The exception was of the draft in suit the proceeds of which, by Wetmore's direction, were credited to the mine, but were almost immediately drawn out on his checks. It was shown that a portion of the proceeds was paid out on the pay roll of the mine, but Wetmore, who was a witness for the plaintiff, admitted that this was in place of money belonging to the mine which he had used for his own purposes. The mine never had any other account with this bank.

The cashier of the bank testified that while discounting

post-dated paper he did not regard it as suspicious; that discounting such paper was common with the banks in that part of the country. He was asked how it was elsewhere, but was not permitted to answer. He also testified that he did not look upon it as suspicious that he was requested not to forward the post-dated paper.

Immediately on the bill in suit being discounted Wetmore started for New York, where he had an interview with the secretary of the mine and with Mr. Tilden. To them he presented a statement of paper issued improperly by him in the name of the New York Iron Mine, and which he endeavored to induce them to assume for the corporation. The amount was $63,933.84, of which he had charged to himself $49,005.14 on the corporate books. Previous to going there he had counseled with a leading lawyer at Marquette, and been assured that he was not liable criminally for these issues, but he did not in New York attempt to justify or excuse his conduct. Mr. Tilden refused to recognize the paper in any way, and denied the liability of the corporation upon it. Included in the statement was the draft in suit, and the one dated July 3d, and also two notes of $5,000 each, discounted by the same bank.

The foregoing is a very brief and much condensed statement of the principal facts upon which the legal questions depend. The evidence leaves upon our minds no doubt upon the following points:

Mr. Wetmore from the first had ample authority to draw bills in the name of the New York Iron Mine on Mr. Tilden, who acted as its treasurer, either at sight or on time, as the wants or convenience of the corporation should dictate, or as its circumstances should appear to render most desirable. But he had no express authority to execute for the corporation negotiable paper of any other description for the purposes of discount.

If Wetmore had implied authority to give post-dated bills, it must be either because he had drawn several such bills in 1869, which had been paid without protest with full knowledge, or because, as it was contended on behalf of defendant in error, a post-dated bill purporting to be payable at sight, is the same in legal effect with a bill dated when drawn and pay-

able at a future day, so that authority to draw the one includes authority to draw the other also.

Of the fact that the bills which Wetmore drew in 1876 and 1877 were post-dated, Mr. Tilden and the other corporate officers in New York had no knowledge, and it was not intended by Wetmore that they should have. There was no corporate necessity or corporate reason for drawing them in that form, and it was done improperly for the benefit of Wetmore, and with the intent that when the bills reached New York it should be supposed they were just drawn. None of the bills were sent forward by the bank for acceptance, and the circumstances suggest the inference that there was at least an implied understanding between the bank and Wetmore that the parties in New York would not be notified that the paper was post-dated. Both the cashier and Wetmore testify to the request of the latter that the draft of July 3d should be retained until that date arrived, and there is scarcely room for doubt that Wetmore understood all this post-dated paper was being kept back in the same way. It is not important to know whether there was or was not any agreement to that effect; the significant facts were, that Mr. Tilden, when paying drafts, would not be apprised that they were post-dated, and that those handling the paper had no reason to suppose he would be.

Upon the foregoing statement it would seem indisputable that if a post-dated bill is to be treated and considered in all respects like a bill payable at a certain time after it is drawn and dated, then Wetmore had authority to draw the paper in suit. But if it is to be considered and treated as paper so different as to require special authority for an agent to execute it, we doubt if there is any evidence in this case that tends to show Wetmore had such authority. We do not overlook the post-dated drafts issued in 1869; but in determining their importance as evidence the following circumstances are to be considered: (1) The great lapse of time. It was conceded on all hands on the trial that the condition of the mine had greatly changed prior to 1876, and it had become and was understood to be a prosperous corporation with abundant means. The presumption that an authority existing in 1869 to make unusual paper was still in force seven or eight years later, after a considerable change in circumstances, would certainly not be

very strong or forcible. (2) The drafts made in 1869 were essentially different from the post-dated bills of 1876–7. The former were all payable at either thirty or sixty days after date, and were post-dated only four and five days in the summer and seven and nine days in the winter months. Compared with the time they had to run this post-dating was not very significant; it was in fact little more than the time that would be required for transmitting the paper from Marquette to New York and for presenting it, and perhaps the purpose was that the dating should correspond to the time when the paper would be likely to reach the office in New York instead of to the time of negotiation. If post-dated paper was unauthorized, so slight an irregularity might well have been overlooked, even if notice had not been promptly given of the drawing of the bills, as seems to have been the case with the paper of 1869. It is not readily perceived that the post-dating in those cases could have been in itself important for any purpose, and the form was probably adopted merely as a convenient one whereby Mr. Tilden in New York would be given the full thirty or sixty days after advice, in which to provide for the paper.

On the other hand the paper of 1876–7 was for the most part post-dated much longer; it was, besides, payable at sight, so that the period of post-dating would be the whole period of discount. There was no notification of its issue until it was sent forward when the day of its date arrived, so that it was well calculated to subserve fraudulent purposes, as it actually did in this case. It was only necessary for Wetmore to refrain from notifying the New York office, and he might then have the benefit of the corporate credit for the purposes for which he had not been empowered to use it, to the full amount of such post-dated paper as he should see fit to draw, and for such time, longer or shorter, as he should post-date it. We can not, in view of all these differences, say that much support for the bills of 1876–7 can be drawn from the payment without protest of the bills of 1869. But (3) the bank had no connection with the bills of 1869; it does not appear that any of the officers of the bank ever knew of them; they were drawn, as the dates before given will show, some time before the bank had an existence. This is important as it bears

upon the claim of the bank that they had a right to suppose from appearances and from Wetmore's management of the business, that his power was ample.

On this subject, also, the circumstances attending the drawing and sending forward of this paper are important. It was said on the argument that there is nothing suspicious in the circumstance that a bill is post-dated; nothing that puts the purchaser upon inquiry. The legal authority for this is to be found, if anywhere, in *Brewster* v. *McCardell*, 8 Wend. 478, where SUTHERLAND, J., says: "There is no legal objection either to ante-dating or post-dating a note, and I am not prepared to say that either is in itself, and disconnected from other circumstances, a legal ground of suspicion, so as to put the indorsee upon inquiry and subject him to all the equities existing between the original parties." This cautious statement, that the post-dating as a ground of suspicion, falls short of charging the indorsee with equities existing between the original parties —has doubtless by inadvertence, been converted by one text-writer into a positive asseveration that the fact that a bill or note is negotiated prior to the day of date "is not a suspicious circumstance against which parties must guard:" 1 Daniel, Neg. Inst. § 85. But the difference between a merely suspicious circumstance and such "legal ground of suspicion" as will charge an indorsee with equities existing between the original parties is so great that we need not fall into confusion here. The same text-writer in his valuable treatise has carefully collated the adjudged cases to show that the decided weight of authority in this country, and the settled law in England, is that mere knowledge of circumstances that would excite suspicion in the mind of a prudent man at the time he becomes the transferee of negotiable paper, is not sufficient to affect the paper in his hands with pre-existing equities: 1 Daniel, Neg. Inst. §§ 770–776.

To charge the transferee with such equities, he must have had actual notice of them, or at least, he must have had knowledge of such facts and circumstances as would have made his taking the paper with the intention of enforcing it, an act of bad faith: *Goodman* v. *Simonds*, 20 How. 343; *Murray* v. *Lardner*, 2 Wall. 110; *Phelan* v. *Moss*, 67 Penn. St. 62; *Hamilton* v. *Vought*, 34 N. J. L. 187; *Magee* v. *Badger*, 34

N. Y. 247; *Crosby* v. *Grant*, 36 N. H. 273; *Farrell* v. *Lovett*, 68 Me. 326; *Commercial etc. Bank* v. *First Nat. Bank*, 30 Md. 11; *Spooner* v. *Holmes*, 102 Mass. 503; *Matthews* v. *Poythress*, 4 Ga. 287; *Bottomley* v. *Goldsmith*, 36 Mich. 27; many other cases are to the same effect.

But the question now is, not whether the bank has taken under suspicious circumstances paper issued by the party whose name it bears, but whether, when that party repudiates the paper as issued without authority, the bank has made good its claim that the paper was taken under circumstances that justified its officers in believing that it was properly issued. As bearing upon this question the bank gave evidence of the manner in which Wetmore was allowed to conduct the business of the mine; that he was the sole managing officer or agent at the mine, and that he was permitted to issue paper bearing some resemblance to the paper in suit. The bank officers are supposed to have acted in the light of all these facts, as constituting certain indications of Wetmore's authority. But they must also be deemed to have acted in the light of all facts within their knowledge having a contrary tendency, and they had no right to disregard any circumstance known to them which would be calculated to lead a prudent man to suspect that Wetmore might be acting without authority and in fraud of his principal.

Now it would be a bold court that should venture to assert that the offer of a post-dated bill for discount was not in itself a circumstance calculated to arrest attention, or that when purporting to be drawn under a power, it would not tend, any more than any other, to excite suspicion.

No one disputes that such paper may be lawfully made, or that it will charge the maker with responsibility, or that it is sometimes negotiated; but when put upon the market, it will commonly be for special reasons, and these may or may not be such as the maker would be willing to disclose. A post-dated check, for example, may be made instead of another, because the maker at the time has no funds against which he can draw, but expects to supply them before the date named shall arrive; and a post-dated bill may be issued for the same reason. In either case, if the maker were responsible and had made the check or bill himself, no occasion would appear for questioning the pa-

per, though even then the query would naturally be suggested, why the ordinary form of time paper was not adopted. But we have no reason to believe that any banker to whom paper should be presented for discount by a third party before the time of its date, would look upon the offer as so far an ordinary occurrence that he would take it with the same promptitude as he would any other paper of equal apparent responsibility, and on the supposition that he had as little occasion to inquire into the circumstances of its issue. But in this case the paper was not only post-dated, but it was issued under a claim of agency, and the question of power was involved. It was the plain duty of a party proposing to take it to take notice of whatever was unusual, either in the form of the paper or in the accompanying circumstances, which might tend to raise doubts in his own mind whether the authority which was asserted had, in fact, an existence, and among the most important of these circumstances would be those which indicated that the paper afforded special opportunities for fraud upon the alleged principal. He would not be at liberty to look exclusively at the facts which lead to one conclusion, and to disregard merely suspicious circumstances because in themselves they were inconclusive; for the fact of authority or apparent authority is one to be deduced from all the circumstances, and he must at his peril take them all into consideration.

In this case the bank assumed from certain facts and circumstances that Wetmore was lawfully empowered to draw the disputed bill. These were, that he was a stockholder in the mine; that he was general agent in that locality; that he had undoubted authority to draw time and sight drafts; and we will add the further fact not then known to the officers that eight years ago when the circumstances of the mine were different, and when it was not reputed, as it was at this time, to have plenty of ready means, Wetmore had drawn some post-dated time drafts which had been paid without dispute. But to set over against these were the following facts: Wetmore for more than a year had been making, in the name of his principal, paper of an unusual form and to a large amount; the power under which he assumed to make it was one easily abused, and for the existence of which there was not, so far as his principal was concerned, the slightest apparent occasion.

In legal effect the paper was time paper, but it was so made use of and managed that when it went forward for payment, it would appear to be sight paper, and unless the principal was notified to the contrary, it would be accepted and paid as such. It was therefore deceptive paper, and on the face of the transaction, not an honest reason would be apparent for issuing it, rather than paper of the same legal effect which would tell its own story on its face, and consequently be incapable of the like deception. Dishonest reasons, on the other hand, might readily be suggested, and a circumstance not previously mentioned might tend to supply these. Wetmore was then seriously embarrassed in his own affairs; was in great want of money, and had difficulty in meeting his financial necessities. The bank officers had some knowledge of this fact. If he drew time paper upon his principal, it might at once be sent forward for acceptance; but whether so sent or not, it would show when presented at what time it was drawn and for what time it had been discounted. But the discount of post-dated paper which his principal would suppose when payment was made, was issued at the time it bore date, might easily be made to assist him in supplying his own necessities on the credit of his principal, provided it was not prematurely sent forward. This was not likely to happen; but a request in a particular case that it should not be, could only be explained on the supposition that Wetmore desired his principal to remain in ignorance that the paper was negotiated. The last bill issued before the discount of the one in suit, was made to take up another post-dated bill which had never been sent forward at all, but was both made and taken up by Wetmore himself. Now if Wetmore could legitimately do this once he could do it any number of times; and he would thus make the power to draw bills equivalent in his hands to the power to make promissory notes, which would be a manifest perversion and abuse of that power.

Then, again, the fact of the giving by Wetmore of what he called "collateral draft," when he thus procured a post-dated draft to be discounted, would seem to indicate that he was conscious that the transaction was not legitimate. If Wetmore lived, the post-dated bill would be sent forward for payment when the date was reached, and would appear to Mr. Tilden le-

gitimate, proper and usual. If Wetmore chanced to die, the time paper would be sent forward instead, and would also appear legitimate and proper. But that would be sent forward only after all opportunity for using paper for fraudulent purposes had gone by. If the bank officers had demanded of Wetmore his reason for issuing the principal bill at all when the collateral would have accomplished the ostensible purpose as completely, and would have been the customary and regular paper to give and take, it is probable that his illegitimate transactions would have terminated at the first occasion on which such a "collateral" was offered.

We attach no importance to the evidence which was received to show that the post-dated paper was so common in the Lake Superior region as not to attract special notice. If there is no mistake about the fact, it is certainly remarkable; and if it is exceptional, as it was on the trial assumed to be, it can not be allowed to affect the rights or liabilities of parties who suppose they are contracting and incurring liabilities only under the general rules of mercantile and banking law. Local usages are allowed to affect these only to a very limited extent, and under circumstances when they must be considered as made by the party a part of his contract: *Mills* v. *Bank of U. S.*, 11 Wheat. 431; *Jackson* v. *Henderson*, 3 Leigh, 196; *Woodruff* v. *Merchants Bank*, 25 Wend. 673; *Kilgore* v. *Bulkley*, 14 Conn. 362.

A party at New York has a right to suppose that the same rules of commercial prudence, integrity and accountability prevail in Marquette as elsewhere, and that he is subject to no unusual liabilities or contingencies by reason of the paper to which he becomes a party being made at that point.

There is no denying, as we think, that the facts disclosed in the evidence and above recited, were suspicious facts, and ought to have been so regarded and to have put the bank officers upon special inquiry regarding the authority which Wetmore assumed to exercise. They were not at liberty to overlook and wholly disregard such facts, as they evidently did in this case. We do not say that if Wetmore's authority had been ample, these circumstances would have been sufficient to defeat the paper in the hands of the bank, but they were most cogent evidence

on the question of Wetmore's authority, and they so pressed themselves upon the attention when the paper in suit was discounted, that they could not fail to be noticed. But is it true that post-dated drafts are to be considered as so far identical with the customary time drafts, as that authority to draw the one must be deemed to include authority to draw the other? The circuit judge has answered this question in the affirmative.

It is no doubt the fact that a post-dated draft, purporting to be payable at sight, is for all the legal purposes of presentment, demand, protest and payment, a draft payable a certain time after date.

But in order that authority to make time paper shall be held to cover post-dated paper, their legal effect must not only be the same but all their incidents so far identical that we may fairly suppose both were in mind when the authority was given; for the authority is not to be construed on technical reasoning but by intent. Is this the case? Unfortunately judicial decisions throw but little light upon the subject. In *Forster* v. *Mackreth*, L. R. 2 Exch. 163, it was decided that authority to draw a check did not authorize drawing a post-dated check, because "so far as regards its practical effect, a post-dated check is the same thing as a bill of exchange at so many days' date as intervene between the day of delivering the check and the date marked upon it." And see *Re Brown*, 2 Story, 502; *Andrew* v. *Blachly*, 11 Ohio St. 89.

But while a bill of exchange is usually allowed days of grace, a post-dated check is not: *Mohawk Bank* v. *Broderick*, 10 Wend. 304; S. C. 13 Wend. 133; *Salter* v. *Burt*, 20 Wend. 205; *Taylor* v. *Sip*, 30 N. J. L. 284.

The proposition, therefore, that authority to draw bills would include authority to draw post-dated checks, is one which could not be supported. The two classes of instruments are similar, but they are not, in legal effect, identical.

But a post-dated bill differs also from a bill payable a corresponding number of days after it is drawn. It is true that the question of the right to days of grace might be settled by the terms of the bill itself, but there would be an important difference in this: that the time bill would be subject to be sent forward for acceptance, while the post-dated bill would not. The latter must stand upon the responsibility of the

drawer until the time of date arrives. It could not be dishonored by refusal to accept it before its date, because the drawer does not undertake to have funds in the drawee's hands to meet it before that day arrives; and the drawee if he were in funds to meet it, could not retain them for the purpose as against other bills drawn and payable before the date arrived: *Godin* v. *Bank of Commonwealth*, 6 Duer, 76; *Champion* v. *Gordon*, 70 Penn. St. 474, 476.

Now it is evident that it was precisely this difference between time bills and post-dated bills that Wetmore relied upon in making use of the credit of the New York Iron Mine for his own purposes. It is true that all time bills are not required to be sent forward for acceptance, but any of them may be, and as a matter of prudent precaution and for additional security, are liable to be. Wetmore must have known the rules of the law merchant on this subject, and he also knew that for time paper he must eventually account as of the day when it issued. But for post-dated paper he would account only from the time of its date; and if he concealed from the New York parties the fact of its being post-dated, he might continue improperly to use the credit of the corporation. But the sending forward for acceptance of a single bill would have exposed his abuse of his trust.

How can we say that authority to draw one paper includes authority to draw another, when the difference between them consists in a particular that peculiarly exposes the principal to be defrauded and plundered? Especially when the one paper is that which is common and customary, so that it would naturally be in mind in creating an agency, while the other is altogether exceptional?

But a claim is made by the bank that the mine should be held liable upon this draft because a portion of the proceeds were used by Wetmore to pay its bills. If this were true, it is probable that the mine might be held liable on any quantity of unauthorized paper which Wetmore saw fit to issue. His evidence shows that he used these proceeds where he should have used moneys he had misappropriated, so that it was rather accidental than otherwise that these particular moneys went to pay demands against the mine. The fact remains, however, that the draft was drawn to aid a misappropriation, and the question of liability upon it is purely a question of authority

to make it. We think the court erred in its rulings bearing upon the question of authority.

The judgment must be reversed with costs and a new trial ordered.

The other Justices concurred.

1. Note payable out of the mine: *Anspach* v. *Best*, 52 Pa. St. 356; *Post* PLEADING.

2. Contemporaneous agreement that note absolute in form should be payable only on sale of certain mines, is admissible to defeat suit by the holder, who bought after maturity: *Munro* v. *King*, 3 Colo. 238; *Post* PLEADING.

3. Defense to note given on purchase of mines on account of misrepresentations: *Davidson* v. *Jordan*, 47 Cal. 351; *Post* FRAUD; *Fitz* v. *Bynum*, 55 Cal. 459; *Post* STOCK.

4. Attempt to defeat purchase money notes after collusion with adverse claimant: *Bank* v *How*, 1 Mont. 604; *Post* PLEADING.

5. Refusal to give possession, a defense to purchase money notes: *Gilmore* v. *Hunt*, 66 Pa. St. 321; *Post* MEASURE OF DAMAGES.

6. Note payable in salt; the residence of payee *held* the place of delivery: *Goodwin* v. *Holbrook*, 4 Wend. 377.

7. Note payable in gold dust, treated as, therefore not negotiable: *Houghton* v. *Ely*, 26 Wis. 206. Similar instrument treated substantially as a note: *Creighton* v. *Vanderlip*, 1 Mont. 400; *Post* GOLD DUST.

8. Corporation can give its note: *Moss* v. *Averell*, 10 N. Y. 449; *McGargell* v. *Hazleton Co.*, 4 W. & S. 424; *McCullough* v. *Moss*, 5 Denio, 567; *Post* STOCK.

9. Defense of usury not allowed to corporate note in New York: *Stewart* v. *Bramhall*, 74 N. Y. 85.

10. Where note is given by unincorporated association, all its individuals are bound: *McConnell* v. *Denver*, 35 Cal. 365; *Post* PARTNER.

11. Note of mining partnership: *Decker* v. *Howell*, 42 Cal. 636; *Post* PARTNER. Note signed in name similar to, but not identical with the firm name: *Faith* v. *Richmond*, 11 Ad. & El. 339; *Post* PARTNER. Note of inchoate partnership: *Fox* v. *Frith*, 10 M. & W. 131; *Post* PARTNER.

12. Agent can not make note: *New York Mine* v. *Bank*, 1 M. R. 453; *Washburn* v. *Alden*, Id. 320.

13. Adding the word *agent* implies a negation of personal liability: *Conro* v. *Port Henry Co.*, 12 Barb. 27.

14. A draft drawn on "L. A. Rosenmiller, Treas.," by "Chas. F. Hale, Pres.," *held*, the personal debt of Hale as against the holder: *Rand* v. *Hale*, 8 W. Va. 495.

15. A draft drawn on a mining firm or company was accepted in the firm name by one of the firm, but he had no authority to accept for his associates. *Held*, that he was liable as on a personal acceptance: *Owen* v. *Van Uster*, 10 C. B. 318.

16. Drafts drawn and cashed on account of coal about to be delivered *held*, to effect an equitable assignment of the amount due on the coal: *Young* v. *Northern Co.*, 9 Reporter, 269; *Post* MORTGAGE.

MOODY ET UX. V. MCDONALD.

(4 California, 297. Supreme Court, 1854.)

Measure of damages. In cases of negligence simply, the rule is to allow the actual damages, and it is error to instruct a jury that they may award smart money.

Verdict, how recorded. A verdict for $2,500 actual damages and $2,500 smart money should be recorded as rendered and not as an entire verdict for $5,000.

Appeal from the Superior Court of the City of San Francisco.

This was an action brought by plaintiffs to recover damages from the defendant for injuries sustained by plaintiff's wife, on the 23d day of June, 1853, by reason of the carelessness and negligence of the defendant, by his agents and servants, in recklessly and improperly discharging a blast, at defendant's stone quarry, and by neglecting to give proper notice thereof. The damages were laid at $3,000.

Defendant denied all the allegations of the complaint.

The cause was tried on the 15th day of September, 1853. After the evidence on both sides was offered, the court charged the jury that they must render a verdict for the plaintiffs, etc. If the jury believed that due diligence and care were not exercised, they were at liberty to give smart money; if the jury, however, believed that due diligence and care were used, the jury are not to give punitive damages. The defendant excepted to the charge of the court. The jury came into court, and upon being asked how they found, the foreman stated that they found for the plaintiff in the sum of $5,000; $2,500 for actual damages, and $2,500 for smart money.

The defendant's attorney requested the court to direct the clerk to record the verdict as rendered by them. The court stated that the verdict must be recorded entire, and declined to direct the clerk to record it as given in. The foreman of the jury then stated that their verdict was for the plaintiffs, in the sum of $5,000. The defendant excepted to the ruling

of the court in refusing to have the verdict recorded as the jury first rendered the same.

Plaintiffs' counsel filed a *remittitur* for the sum of $2,000 over and above the $3,000 damages laid in the complaint, and took judgment for $3,000 damages and costs, against the defendant, who moved for a new trial, which was denied; whereupon he appealed from the judgment and the order refusing a new trial.

BURRITT & GORHAM, for appellant.

The pursuit of the appellant was a lawful one. The true rule in such cases is laid down in 21 Wend. 618. One so engaged, accidentally doing damage, is not responsible, unless the injury was the result of his negligence, or done willfully: 8 Wend. 472; 8 John. 92. No negligence was shown. Even if there had been negligence, the jury could not give smart money. The injury to the plaintiffs was all they claimed redress for; not punishment to the defendant: see Law Reporter for 1847. Vindictive damages are not authorized when there is no malice, and this rule applies equally to cases of injury to persons as well as to property: 13 Johns. 131; 23 Wend. 425; Baldwin C. C. R. 142; 9 Barn. & Cress. 725; 4 Carr. & Payne, 161; Sedgwick on Damages, 548–9, 570.

SAMUEL H. DWINELLE, for respondents.

The defendant was liable, even if negligence had not been alleged or proved: 2 N. Y. 160, and cases there cited. When there is conflicting evidence on a point submitted to a jury, their verdict will not be disturbed: 1 Cal. 373; 2 Id. 17. This court have held that vindictive damages, *i. e.*, smart money may be given in a civil action for a personal injury: 2 Cal. 54; Sedgwick on Damages, 453, 468, and cases cited. The power to grant new trials is one of legal discretion and only the abuse of it would justify an appellate court in interfering with such order: 2 Cal. 177; Id. 348. There was no such abuse in this case.

Mr. J. HEYDENFELDT delivered the opinion of the court. Mr. Ch. J. MURRAY and Mr. Justice WELLS concurred.

The court erred in laying down the measure of damages. In cases of negligence simply, the rule is to allow the actual damages. The court should also have recorded the verdict as it was rendered by the jury, and as the record discloses how it was rendered, we must treat that as the verdict which the jury actually brought in.

How then does the case stand? The jury find $2,500 actual damages, and $2,500 smart money. The award of smart money, under the charge of the court, suffices to convict the defendant of negligence, and entitles the plaintiff to recover the actual damage; and the latter having been separately ascertained by the verdict, the case is free from every difficulty, and judgment should have been rendered for the plaintiffs for that amount only.

The judgment is reversed, and judgment here rendered for the plaintiffs for the sum of twenty-five hundred dollars and the costs of the court below.

Motion for a rehearing was denied.

WRIGHT ET AL. v. COMPTON.

(53 Indiana, 337. Supreme Court, 1876.)

Master and servant liable as co-defendants. For injuries to a third party caused by the negligence of his servant, the master and servant are both liable and may be joined as defendants in the same action.

[1]**Negligence immaterial where the act is unlawful.** Where the act itself is unlawful the allegation of negligence becomes immaterial. The *result of blasting*, called by the court "the act of casting fragments of rock upon the plaintiff," *held*, to be *an unlawful act*.

Damages for pain and anxiety. In an action for damages on account of physical injury, the jury in estimating the amount of damages may consider, and may be instructed to consider, the suffering and anxiety of mind of the plaintiff, caused by the injury, without special allegation of such suffering and anxiety in the complaint.

From the Putnam Circuit Court.

G. A. KNIGHT, for appellants.

[1] The language in the opinion which necessitates such a syllabus, is a mere perversion of, or trifling with terms.

S. W. CURTIS, for appellee.

BIDDLE, J.

This action was originally brought in the Clay Circuit Court by Richard M. Compton, against Mansur H. Wright, Milroy Brackney, Franklin P. Cutshaw and Isaac King.

The venue was changed to the Putnam Circuit Court. The complaint states the following facts:

"That on the 11th day of February, 1873, the defendant, Mansur H. Wright, was the owner of and operating a certain stone quarry, situated in Brazil township, Clay county, Indiana, and as such owner and operator, the said defendant had employed and engaged at work in and upon said stone his co-defendants, employed by him to dig and remove the stone from said quarry; that in the mining and removing of said stone from said quarry, the men so employed and at work for said Wright, with the said Wright's knowledge and consent, were in the habit [of drilling] and did on said 11th day of February, 1873, drill holes in the stone there located, and filled the same full of powder, and then and there communicated fire to the powder, for the purpose of breaking and loosening the rock situated in said stone quarry; that there is and was on said 11th day of February, a public highway, running past and near to said quarry, and at the point where said powder was used for the purpose aforesaid; that on said day, this plaintiff was passing along and upon said public highway, as he lawfully might do, with his wagon and team; that as he was opposite and near to said quarry, and where said blasting was done, the said defendants then at work upon said stone, carelessly and negligently applied fire to the powder arranged as aforesaid, just as this plaintiff was at a point on said highway nearest to where said blasting was done, by reason of which large quantities of stone were thrown in different directions, portions of which were driven and thrown in great violence against and upon this plaintiff then and there doing him great bodily harm, and inflicting upon his person dangerous and painful wounds, by reason of which he became and was sick, sore, and lame, and so continued for the period of ten weeks; that said wounds, so inflicted as aforesaid, prevented him from attending to his business and kept him con-

fined to his house for and during all the said time; that by reason of said wounds, he is permanently disabled in his right leg, which prevents him from performing the duties of farming, by means of which he gained a livelihood; that he was forced to and did lay out and expend for medical and surgical attention large sums of money, to wit: five hundred dollars; that he was forced to and did lay out and expend the sum of fifteen [dollars] in and about trying to get cured and healed of said wounds; that, as such owner and workmen, said defendants knowingly, carelessly and wrongfully worked said quarry at all hours of the day, providing no known means to warn parties of their danger in passing along and upon said highway; that said injuries aforesaid, inflicted as aforesaid, were so done by the defendants without any fault or negligence on the part of this plaintiff; wherefore," etc.

The appellee afterward dismissed his action as against Franklin P. Cutshaw and Isaac King. Wright, separately, and Wright and Brackney, jointly, demurred to the complaint, alleging as cause of demurrer the insufficiency of the facts averred to entitle the appellee to recover. The demurrers were overruled, and exceptions reserved. An answer in three paragraphs was filed, the second and third of which were struck out on motion leaving the sole issue of the case on the general denial.

Trial by jury; verdict for appellee.

The usual motions were made, rulings had upon them, and exceptions taken to bring the case here.

The insufficiency of the complaint is strongly urged upon us, especially as against Wright, to hold him responsible for the acts of his quarrymen; but, in our opinion, it is good as against both Wright and Brackney. The general rule is, that a master is responsible for injuries to others resulting from the carelessness or negligence of his servants, while in the performance of the master's business.

The law is clearly and forcibly stated by FRAZER, J., in delivering the opinion of this court in the case of *The Evansville, etc., R. R. Co.* v. *Baum*, 26 Ind. 70, to which we fully adhere.

In addition to the authorities cited in that case, we add the following: *Bush* v. *Steinman*, 1 B. & P. 404; *The Philadelphia etc., R. R. Co.* v. *Derby*, 14 How. U. S. 468; *Moore*

v. *Fitchburg R. R. Corporation*, 4 Gray, 465; *Hewett* v. *Swift*, 3 Allen, 420; *Howe* v. *Newmarch*, 12 Allen, 49; *Ramsden* v. *Boston, etc., R. R. Co.*, 104 Mass. 117. That the servant is also liable for his own carelessness and negligence, and that the master and servant may be joined in the same action, are principles well settled.

The appellants requested the court to give the following instruction to the jury:

"The defendant, in the quarrying of stone near the public highway, had a right to use gunpowder; but, in employing so dangerous a material, he would be held to the exercise of extraordinary diligence and care, in preventing an injury to those who might pass over or along said highway; and if you find that this care and diligence were exercised by the defendant, or his agents, at proper times, and in a proper manner, as by warning travelers not to approach said quarry, or not to pass at the time when blasting was going on, and that such reasonable and proper precautions were observed as careful and prudent men would exercise under such circumstances, then the defendant would not be liable in this action to the plaintiff for damages, as he could not be said to be acting negligently or carelessly, while thus exercising every reasonable and proper precaution to prevent injury."

The court refused this instruction, as it was requested, but modified and gave it as follows:

"The defendant, in the quarrying of stone near the public highway, had a right to use gunpowder; but in employing so dangerous a material, he would be held to the exercise of extraordinary diligence and care, in preventing an injury to those who might pass over or along said highway: and if you find this care and diligence were exercised by the defendant, or his agents, at proper times, in a proper manner by warning the plaintiff not to pass said quarry, because of an impending blast, and the plaintiff disregarded said warning, and by so doing, contributed to his injury, then the defendant would not be liable in this action to the plaintiff for damages."

We are of opinion that the court committed no error, either in refusing the instruction requested, or giving it as modified. The question involved is not one of negligence on the part of the defendants. The act charged against them is, in

itself, unlawful--not the act of blasting and quarrying rock, but the act of casting fragments of rock upon the plaintiff, to his injury. When the act in itself is unlawful, it is immaterial whether it is done ignorantly, negligently or purposely, except in the measure of damages. Every person must so use his property, and exercise his rights, as not to injure the property or restrict the rights of others.

In this case, the defendants could not lawfully so use their stone quarry as to embarrass the rights of travelers along the public highway.

The public travel must not be endangered to accommodate the private rights of an individual.

In the case of *Hay* v. *The Cohoes Company*, 2 Comst. 159, where the company, while digging a canal upon its own land, in prosecuting the work, by a blast of gunpowder threw fragments of rock against the dwelling-house of the plaintiff, whereby it was injured, it was held that the company was liable for the injury, although no negligence or want of skill in executing the work was alleged or proved.

GARDINER, J., in delivering the opinion, very properly remarks:

"A man may prosecute such business as he chooses upon his premises, but he can not erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of a lawful trade. He may excavate a canal but he can not cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he can not construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner."

So, we think, in this case, if the defendants can not work their stone quarry without endangering the safety of travelers on the public highway, they must abandon it, or answer in damages for the injuries thus done. The same principle is held in the case of *Tremain* v. *The Cohoes Company*, 2 Comst. 163; see also, *The Queen* v. *Mutters*, 34 L. J. Mag. Cases, 22.

Even where a person was killed by a blast of gunpowder in a stone quarry, while passing along a foot path, over the quarry

lots owned by the defendants—the path having been habitually so used for many years—the question of negligence on the part of the deceased was left to the jury, whether such a use of the path would warrant the finding of a license to so cross the lots, and it was held that the defendants were liable: *Driscoll* v. *The Newark, etc., Co.*, 37 N. Y. 637.

Several other instructions, involving the same principles, are excepted to and brought before us, but they are disposed of in the above view of the law, and need not be particularly examined.

The court, after instructing the jury as to the rule of compensatory damages, used the following words in conclusion: "To which you may add such an amount as you, in your discretion, think will be a just compensation to the plaintiff for such suffering and anxiety of mind as are fairly and reasonably the plain consequences occasioned to him by the injury done."

To this the appellants seriously object, because "there is no claim for damages in the complaint, based upon suffering and anxiety of mind." Nor need there be. It is not matter of special damages, and therefore need not be specially alleged; but it is the natural and direct consequence of the injury charged. Imaginary suffering and fanciful anxiety of mind would not be ground for damages; but suffering and anxiety of mind caused by corporal injuries may be considered by the jury in estimating the amount of damages: *Taber* v. *Hutson*, 5 Ind. 322; *Cox* v. *Vanderkleed*, 21 Ind. 164; *Fisher* v. *Hamilton*, 49 Ind. 341. And we think the evidence fully sustains the verdict.

The appellants have shown us no error in the record.

The judgment is affirmed, with costs.

CITY OF TIFFIN v. MCCORMICK.

(34 Ohio State, 638; 32 A. R. 408. Supreme Court, 1878.)

Master and servant—Employer and contractor. The city of T. hired A. to quarry stone in its quarry, break the same to a certain size, pile it so that it could be measured, and to find the powder and tools for said work, all for $1 per perch. The city had no further control over A. in the

work. The broken stone was for improving the streets of the city. A. in blasting the stone, set fire to and destroyed M.'s building. *Held*, that, the city and A. sustained the relation of master and servant rather than that of employer and contractor, and that the city was liable for the injuries inflicted by A.

Action of damages for injury to plaintiff's building for blasting on defendant's land. The plaintiffs had judgment, and the following bill of exceptions was taken:

"Be it remembered, that upon the trial of this cause by a jury in said court of the February term thereof, 1874, the plaintiffs, to maintain the issues upon their part, offered and gave evidence tending to prove that one Joseph Ardner, on the day the building and other property mentioned in the petition was burned, was engaged in blasting stone in a stone quarry near to the buildings so burned, and tending to prove that said building, and other property, was burned by fire communicated by the operations of said Ardner, in blasting stone in said quarry, and also proved that said Ardner, was quarrying stone for the defendant, in a stone quarry belonging to the defendant, which stone were to be broken by said Ardner, and to be used by the defendant, in improving or repairing its streets.

"And thereupon the said defendant, the city of Tiffin, to maintain the issues on its part, proved that upon the occasion mentioned and referred to in the petition of the said plaintiffs herein, and in their said testimony, it had hired or engaged the said Ardner to go into its said stone quarry, quarry stone therein, break the same to a certain specified size, pile them up in said quarry so that they could be measured, and to furnish and find the powder and tools for said work—all for and at the agreed price of one dollar for each and every perch as measured in said quarry. That it had no other or further control over said Ardner in said work, and that the said stone so quarried, broken, and piled up by said Ardner, in said quarry, under said engagement, was for improving the streets of the said defendant.

The defendant thereupon requested the court to charge and instruct the jury,—

"That if Mr. Ardner quarried this stone, and broke it to a certain size, under an agreement with the city of Tiffin, to get

a certain price a perch, for the quantity of stone so broken and quarried, and if under his agreement with the city he was to manage the work in his own way, and the city did not reserve the right to control and direct him in said work, and the mode and manner of doing it, further than to require said stone to be broken to a certain size and so piled up as to be measured, then and in that case, he would not be the agent or servant of the city, and if not such agent or servant, then the city would not be liable for any injury resulting from the mode and manner of doing the work, or the means used in its performance—which charge and instruction the court refused to give to the jury, and the same was not given.

"But the court did thereupon charge the jury, that if the said property of the said plaintiffs was burned and damaged by fire communicated to it by said Ardner, in his blasting the said stone in said quarry, under the said engagement proven by the said defendant, then the plaintiffs were entitled to their verdict for the value of their property so burned and damaged."

JOHN MCCAULEY and A. LANDON, for plaintiff in error.

GEORGE W. BACHMAN and N. L. BREWER, for defendants in error.

MCILVAINE, J.

It is claimed by plaintiff in error, that the relation shown to have existed between the city and Ardner was that of employer and independent contractor, from which no liability falls upon the employer on account of the manner in which the employment is prosecuted, the rule being in such case, that the contractor is alone responsible for an injury inflicted upon third persons by reason of his wrongful act.

We concede the general rule of law to be that an independent contractor is alone responsible for an injury inflicted by him upon third persons, and that his employer is not within the principle upon which the doctrine of *respondeat superior* rests. Yet, it is equally certain that the employer is also liable for the wrongful act of the contractor under circumstances which show that he, as clearly as the contractor, was the author and promoter of the injury. For instance where the prosecution of the work as authorized by him necessarily

produces the injury, he, as well as his contractor, is responsible for the damage: *McCafferty* v. *The Railroad Co.*, 61 N. Y. 178. [19 A. R. 267.] And again when the contractor prosecutes his work in the manner authorized by the employer in the express terms of the contract, the employer must be regarded as having assented to, and as procuring the unlawful act to be done, and is therefore liable as a joint wrong-doer: *Carman* v. *S. & S. Railroad Co.*, 4 Ohio St. 399. Within the principle of the case last cited, the liability of the city for the wrongful act of Ardner, although he be considered as an independent contractor, must be affirmed; for it clearly appears that the work of quarrying stone on the city's premises, by blasting, was clearly assented to and authorized.

But we are of opinion that the true relation between the city, as proprietor of the stone quarry, and Ardner, was that of master and servant, instead of employer and independent contractor within the principle of the rule above stated. There was no "job" or defined quantity of work contracted for. The services of Ardner were subject to be determined at the pleasure of either party. The compensation was to be measured by the quantity of labor performed. It appears to us to have been an ordinary contract for work and labor, which creates, between the employer and employed the relation of master and servant, within the meaning of the law in regard to that subject. It is true that the services, namely, the quarrying of stone in the employer's quarry, was to be done by the use of powder and tools furnished by the employe; but this condition in the contract did not affect the legal relation between the parties. It was significant only as a matter affecting the rate of compensation. And it is also true that the city "had no other or further control over Ardner in said work." Whether this language means that the city exercised no other or further control, or that the city contracted with Ardner that it would not exercise any other or further control over the work, makes no difference. If it were a mere failure to exercise control, it was the fault of the city. If it was part of the contract with the servant, that no other or further control should be exercised by the city, it is enough to say that a master can not exonerate himself from responsibility to third persons, which the law imposes upon him, for injury resulting

from the misconduct of his servant, by contracting with the servant that he will not exercise any control over him, and will not, therefore, be responsible for any injury that he may wrongfully inflict.

It only remains, therefore, to be considered whether the city of Tiffin, if the injury complained of had been inflicted upon the defendant in error, by its own act would be liable for the damages. That a municipal corporation, as the proprietor of lands, would be responsible for an injury resulting from the use of its own property to an adjacent proprietor, to the same extent as if it were a natural person, is not questioned.

As between the owners of adjacent lands, the maxim of the common law, *Sic utere tuo ut alienum non laedas*, applies with special force, not because it forbids the exercise of the right of dominion or control of property, according to the pleasure of the owner, in one case more than another, whether it be real or personal property, or whether it be owned for special or general uses; but because the right to use or control it, according to the pleasure of the owner, is limited under some circumstances more than under others. Undoubtedly, the right to use property as the owner may please, provided that reasonable care is taken not to do unnecessary injury to others, is the ordinary rule. But this rule can not be interposed to justify the committing of a trespass or the maintaining of a nuisance. A man who digs a pit on his own land, whereby the soil of an adjoining proprietor is disturbed on account of the loss of lateral support, can not justify his act on the ground that he used reasonable care to prevent the injury. Neither can one in possession of a parcel of land operate and manage a mine or quarry upon it, in such a manner as to injure or destroy the property of an adjoining proprietor—and justify himself by showing that he used ordinary care in the use of his own property. In such cases, the right to use is subject to the limitation that its use will not injure his neighbor. The true doctrine upon this point is well stated in the case of *Hay* v. *Cohoes Co.*, 2 N. Y. 159, as follows: "The use of land by the proprietor is not, therefore, an absolute right, but qualified and limited by the higher right of others, to the lawful possession of their prop-

erty. To this possession, the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. A man may prosecute such business as he chooses upon his premises, but he can not erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of lawful trade: 9 Coke, 58. He may excavate a canal, but he can not cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he can not construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner. And in *Tremain* v. *Cohoes Co.*, Id. 163, it was held that in such case, evidence to show that the work was done in the most careful manner, is inadmissible where there is no claim made for exemplary damages.

Judgment affirmed.

SOWDEN v. IDAHO QUARTZ MINING COMPANY.

(55 California, 443. Supreme Court, 1880.)

"Reputation" of powder. A question concerning the *reputation* of a certain powder as a safe or dangerous blasting compound is incompetent when the issue is as to the *safety* of the powder; but the opinion of a witness as to its safety, based upon his personal experience with the powder, is proper.

Set of instructions. Certain instructions defining the rights and liabilities of master and servant *approved* (see statement of case for the instructions).

New risks arising after original employment. The instruction, "That there is another qualification or exception to the risk which the servant assumes, and that is, he assumes no risk, except such as existed at the beginning of the employment and such as are incident to the business" should be qualified by words equivalent to these "or which existed during the course of the employment of which the employe had knowledge or was bound to have knowledge."

Notice of motion. A notice of motion for new trial was served upon Mr. R. who had been recognized by Mr. B. as associate counsel with him in the cause. Mr. B. objected that no notice had been served upon plaint-

iff's attorney of record. *Held*, that Mr. B.'s acts constituted a waiver and his objection came too late.

Appeal by defendant from judgment in favor of plaintiff, and from order denying motion for new trial, in the District Court of the Fourteenth Judicial District, County of Nevada.

The facts are stated in the opinion of the court.

The instructions approved by the court in its opinion, but not set forth, were as follows, to wit:

"*First.* As between master and servant, the latter took upon himself all the dangers and risks incident to the employment in which he engages; and, for injuries received in the course of his employment, and naturally resulting therefrom, the master is not liable. Neither is the master liable for injuries to the servant from causes purely accidental.

"*Second.* The burden of proving negligence on the part of the company in this case devolves upon the plaintiff, and if he has failed to establish such negligence, the verdict should be for the defendant.

"*Third.* There is nothing legally wrong in the use by an employer, of a powder less safe to his workmen than some other powder that might be selected, and even though the workman sustain an injury by the use of such powder, he has yet no right of action for such injury, where he knew, or had the means of readily ascertaining, as well as the employer himself, all the facts in relation to the character of the powder and the manner in which it ought to be used.

"*Fifth.* If the jury believe, from the evidence, that the defendant used ordinary care and prudence to avoid exposing its workmen to dangers arising from the use of the Excelsior powder, and that prior to the time the plaintiff was injured, the powder had been so tested by a great number of experiments by practical miners, as to justify a man of ordinary care and prudence in allowing it to be used by his workmen, and the defendant knew of such tests and experiments, then the plaintiff is not entitled to recover in this action.

"*Seventh.* If the jury find, from all the evidence in the case, that an iron bar was reasonably safe for the purpose of tamping the powder in question, and that the defendant, in the exercise of ordinary care and prudence, had a right to

believe, and did believe, that it was reasonably safe for such purposes, then the plaintiff is not entitled to recover because an iron bar was used.

"*Eighth.* The implied contract to furnish safe material and implements for working its mine, is the foundation of defendant's liability in a case of this character. If the workman, being fully capable of choosing and contracting for himself, and with a knowledge, or with ready means of acquiring a knowledge of the risk which he assumes, chooses to undertake a hazardous employment, or to put himself into a hazardous position, no such implied contract arises."

And the court refused to give the following instructions asked by the defendant:

"*Fourth.* The workman is not bound to risk his safety in the service of his employer, and may, at his own option, decline any service in which he has reason to apprehend injury to himself, and if the plaintiff in this case used the powder in question, or any other powder known to be a dangerous explosive, he then assumed all risks incident to such use.

"*Sixth.* If, from all the tests and experiments which the jury may find from the evidence to have been made with this powder before the plaintiff was injured, a man of ordinary care and prudence would have been justified in permitting it to be used by his workmen, for the purpose of blasting in his mine, and the defendant knew of such tests and experiments, and of the result thereof, then the plaintiff is not entitled to recover in this action."

And the court then gave in writing the following instructions, upon the request of the plaintiff:

"*First.* That it is the duty of the master to exercise care and prudence, that those in his employment be not exposed to unreasonable risks and dangers, and that the servant has a right to understand that the master will exercise that diligence in protecting him from injury; and also, in selecting the agent from which it may arise.

"*Second.* That the plaintiff is only bound to use ordinary care in the performance of his work, and that if in the use of such care an accident happens to him, caused by the negligence of the defendant or its agents, then the defendant is liable in damages for the injury received.

"*Third.* That if the jury believe, from the evidence, that the foreman of the defendant disregarded the instructions of the inventor of the powder, and instructed the plaintiff to use the same in a dangerous and unsafe manner, or with dangerous and unsafe implements, and that the plaintiff was ignorant of the proper manner of using this powder, and relying upon and following such instructions and directions of such foreman, with all the usual and ordinary care and skill, he was injured in the manner complained of, he is entitled to recover in this action.

"*Fourth.* That the defendant was bound to furnish proper and safe instruments for the use of its employes in working the Excelsior powder. Therefore, if you believe from the evidence that an iron tamping-bar was an unsafe instrument to use on the powder, or if you believe that a wooden bar would have been safer, then it was negligence on the part of the defendant to furnish iron tamping-bars to its employes, provided the defendant knew, or by the use of ordinary care and diligence could have ascertained, that such iron bar was unsafe, or that a wooden bar would have been safer, and the plaintiff was ignorant thereof.

"*Fifth.* That if you believe, from the evidence, that the powder, aside from the implements used upon it, was unsafe and dangerous in itself, when handled and employed in the same way as black powder, and that the defendant either knew or could have known that fact by the exercise of reasonable care and diligence, then you must find for the plaintiff, provided you further believe, from the evidence, that the plaintiff was ignorant of that fact.

"*Seventh.* That if there is a proximate and discoverable cause which may have produced the injury, and which the evidence will warrant you in finding was sufficient for that end, then the mere fact that another cause existed which was adequate to the production of the same result, will not necessarily relieve the defendant.

"*Eighth.* That when one enters into the service of another, he assumes the probable risks incident to the service, but the risk which the servant assumes must be measured by the master's duty, and is qualified by it.

"*Ninth.* That there is another qualification or exception

to the risk which the servant assumes, and that is; he assumes no risk except such as existed at the beginning of the employment, and such as are incident to the business.

"*Tenth.* In order to imply assent to the hazards and risks, they must be patent, and such as the servant knows of or ought to know of.

"*Twelfth.* That the defendant can not relieve itself from responsibility on account of the carelessness or negligence of a third party; therefore, if you believe that Joseph Thomas was careless or negligent in the use of the powder, and that the defendant, relying on his statement, used the powder in a careless or negligent manner, it is evidence of negligence.

"*Thirteenth.* The employer must in all cases indemnify his employe for losses caused by the employer's want of ordinary care, and if the plaintiff necessarily suffered loss and injury in direct consequence of his obedience to the directions of his employer, he is entitled to recover in this action.

"*Fourteenth.* That if you believe, from the evidence, that the negligent act complained of was committed before the defendant had properly and carefully performed its duty, you must find for the plaintiff, unless you are satisfied that the Excelsior powder, in comparison with black powder, is safe when submitted to the same tests as black powder.

"*Fifteenth.* That "ordinary care" is dependent in a great measure upon the circumstances of each particular case, and that in the use of combustible or explosive materials, great care is required.

"*Eighteenth.* In estimating damages, the jury should take into consideration the bodily suffering of the plaintiff, his pain of mind, and his business, and all expenses, if any, incurred on account of injuries received, and the employment of physicians and nurses, medicine and board, and also whether the injuries are likely to be permanent or only temporary.

"*Nineteenth.* That if you should find for the plaintiff, he is entitled to recover not only the amount of damages which he suffered prior to the commencement of the action, but also all the damages proceeding continuously from the injury complained of, which he has suffered up to the verdict, and which it is reasonably certain that he will suffer in the future. In other words, if the plaintiff is entitled to recover in this action,

you should allow him such damages as in your opinion will fully compensate him for the loss and injury he has sustained.

"*Twentieth.* You are instructed that the defendant in this action can not avail itself of the experiments performed by the Excelsior Powder Company, or of the Providence Mining Company, prior to the introduction by the defendant of Excelsior powder into its mine, as evidence of care on its part, unless you believe, from the evidence, that the defendant knew of these experiments at that time."

Thereafter, the court, of its own motion, gave to the jury, in writing, the following instructions, to wit:

"In this case, as it appears to me, one of the most material questions grows out of the point made by the plaintiff, at the trial, that the defendant introduced into its mine a new powder, known to it to be highly dangerous and unsafe when used for blasting purposes, in the same manner as black powder, without disclosing that fact to the plaintiff; but, on the contrary, directed him to use it, and tamp in every respect as he had been accustomed to use and tamp black powder; whereby, though he followed such direction with great care, prudence and skill, a premature explosion occurred, by reason of his tamping it with an iron bar, as miners were accustomed to tamp black powder, and he was thereby injured.

"Upon this point, I charge you that if the foreman, under whom the plaintiff was working, and from whom he took his orders, was charged with the duty, and had the power to employ and discharge the men, and knew, or had reason to believe, the Excelsior powder could not with safety be tamped with an iron tamping-bar, and without informing the plaintiff thereof, or imparting to him the knowledge he possessed, directed him to use it, and treat it in the same manner as he had been accustomed to treat black powder, including the use of the iron bar; and if the plaintiff followed such directions with ordinary care, prudence, and skill, and a premature explosion occurred by reason of the use of the iron tamping-bar, then the defendant is liable for the injuries the plaintiff thereby sustained, provided said plaintiff was, at the time, ignorant upon the subject.

"It is true that the plaintiff, when he contracted with the defendant to work in its mine, took upon himself all the risks

necessarily and usually incident to such employment, but if the defendant had knowledge or information showing that the particular powder was dangerous or unsafe to a degree beyond that which plaintiff could fairly be supposed to know, or anticipate, it was bound to impart to him such information as that he might then have the opportunity of deciding for himself whether or not he would assume the extra risk and danger."

DIBBLE & KITTS, and GEO. S. HUPP, for appellant.

H. V. REARDAN, for respondent.

MYRICK, J.

This action was brought to recover damages for personal injuries to plaintiff, caused by the premature explosion of blasting powder, known as Excelsior powder, manufactured by one Haffenager. Under the pleadings in this case the substantial issues were:

1. As to the safety of the Excelsior powder as a blasting powder.

2 As to whether the defendant exercised due care in supplying a reasonably safe powder, and in permitting the Excelsior powder to be used by its workmen.

3. Whether the plaintiff knew or ought to have known of the qualities of the powder, and whether he exercised due care in its use.

4. Whether the defendant provided proper appliances for the use of the powder.

The court fully and clearly instructed the jury as to the relations existing between plaintiff and defendant as master and employe, the obligations resting upon each toward the other and as to the care proper to be exercised by each.

Upon the trial, plaintiff asked the witness Price whether Haffenager was a skillful chemist or scientist. Plaintiff also asked the witness Drisco as to the reputation of Haffenager as a scientist or chemist. Notwithstanding defendant's objection, the court permitted the questions to be asked. There was no error in these rulings, as the defendant had by its answer tendered the issue "that said Haffenager was reputed to be and was an accomplished chemist and scientist." Plaintiff asked

the question, "What was the reputation of Haffenager's powder as a safe or dangerous blasting compound?" The witness to whom this question was put, was a quarryman at the Oakland quarry. It does not appear that the reputation referred to by the inquiries to him ever came to the knowledge of defendant or its officers or agents; nor that it existed in any place where it would be the duty of defendant to have made inquiries; nor did plaintiff offer to place that reputation in any locality; the witness may have known the reputation of the powder at Oakland, or in some foreign country. The reputation of the powder was not directly in issue. Its safety was the point in issue. Its reputation was material only in the light of showing whether defendant used proper care in ascertaining its safety. The admission of the answer to this question was error.

The defendant's witness, Polglase, testified that he was a practical miner, not a scientist or chemist; did not know what ingredients composed the Excelsior, black, or giant gowder; had used blasting powders twenty-two years; had used about six hundred pounds of Excelsior powder in six hundred to a thousand blasts in the defendant's mine before the injury to plaintiff, and that no injury of any kind had occurred. He was then asked by defendant, "In the light of your experience, what do you say as to the safety of the Excelsior powder for blasting purposes?" Plaintiff's objection to this question was sustained. Under § 1870, subd. 9, Code of Civil Procedure, defendant was entitled to the opinion of the witness; otherwise no miner, nor any person not a professional scientist or chemist, no matter what experience he may have had, can give his opinion. Usually, the question whether a person be an expert is for the trial court to determine definitely, and the ruling will not be reviewed; but in this case we think the defendant was entitled to the opinion of the witness, based as it was upon his own experience: *Estate of Toomes*, 54 Cal. 509, and authorities there cited; *Blood* v. *Light*, 31 Cal. 115.

We think that all the instructions given, and all the rulings upon instructions, were correct, with one exception, viz.:

"*Ninth.* That there is another qualification or exception

to the risk which the servant assumes, and that is, he assumes no risk, except such as existed at the beginning of the employment, and such as are incident to the business."

This instruction was given at the request of plaintiff. As we understand the instruction, it is, that the employe assumes such risks, and such risks only (not incident to the business), as existed at the beginning of the employment; and if there be a risk which did not exist until after the beginning of the employment, but commenced to exist during the course of the employment, the employe had no risk regarding the same. We do not think that this instruction states the correct rule. It should have added to it words equivalent to these: "or which existed during the course of the employment, of which the employe had knowledge or was bound to have knowledge." If an appliance be introduced after the commencement of the employment, from the use of which follows a risk which the employe knows or ought to know—that is, if the risk or danger be known to him or be patent and obvious—he assumes the risk by continuing in the employment.

G. D. Buckley, Esq., attorney for respondent, makes the point, "There can be no valid appeal from the decision of the court denying the defendant's motion for a new trial, for the reason that no notice of motion to that effect was served upon the plaintiff's attorney of record." The history of the case relating to attorneys for plaintiff is as follows: The complaint is signed "G. D. Buckley, plaintiff's attorney." The order of court, rendering judgment, recites that the cause came on for trial; "the said parties appeared by their attorneys; G. D. Buckley and H. V. Reardan appeared as counsel for the plaintiff," etc. Service of defendant's motion for a new trial was accepted by "H. V. Reardan, one of the attorneys for plaintiff." Service of the notice of appeal was admitted by "G. D. Buckley and H. V. Reardan, plaintiff's attorneys." Service of the transcript was admitted by "G. D. Buckley and H. V. Reardan, attorneys for plaintiff and respondent." The transcript is indorsed, "G. D. Buckley, Esq., and H. V. Reardan, Esq., attorneys for respondent." Three briefs have been filed on behalf of respondent, one signed "Buckley & Reardan, attorneys for respondent, one "H. V. Reardan, attorney for respondent," indorsed "G. D. Buckley, Esq., H.

V. Reardan, attorneys for respondent"; the other, in which the point is made, is signed "G. D. Buckley, attorney for respondent." On the argument, both gentlemen appeared and took part.

From this history it seems to us that Mr. Buckley has recognized Mr. Reardan as his associate in the case sufficiently to estop him and his client from *now* saying that Mr. Reardan was not, at the service of notice of motion for a new trial, one of the attorneys for plaintiff, and as such entitled to receive the service. Mr. Buckley's acts constitute a waiver. Any other view would be as unjust to Mr. Reardan as to the defendant.

Judgment and order reversed, and cause remanded for a new trial.

THORNTON, J., concurred.

SHARPSTEIN, J., concurring.

I concur in the reversal of the judgment and order denying defendant's motion for a new trial. As to the point that the notice of motion for a new trial was not served on the plaintiff's attorney of record, I think that it should be disregarded, on the ground that the objection comes too late.

SMITH v. OXFORD IRON COMPANY.

(42 N. J. L. 467. Supreme Court of New Jersey, 1880.)

Master and servant—Experimenting with giant powder. The plaintiff engaged in the service of a corporation as a miner. At that time ordinary blasting powder was used. Subsequently giant powder, a more dangerous explosive, was substituted by order of the president. The plaintiff was not informed of the proper mode of using it, although the corporation had printed directions. The plaintiff being injured by an explosion *held*, that the corporation was liable.

Action on the case for damages for personal injury by negligence. The plaintiff had judgment below.

On rule to show cause.

HENRY S. HARRIS, for plaintiff.

J. G. SHIPMAN and J. D. BEDLE, for defendants.

VAN SYCKEL, J.

The plaintiff, while engaged in the service of the Oxford Iron Company, as a miner, in September, 1874, lost his eyes, and was otherwise severely injured, by an explosion of giant powder. The plaintiff charged the company with negligence in introducing the new explosive without informing his superiors, or instructing him as to the proper manner of using it, and without advising him fully of its dangerous character. The verdict below was for the plaintiff, and the case is here on rule to show cause why a new trial should not be granted.

The negligence, to be actionable, must be that of the company. A servant who is injured by the negligence of a fellow servant, can not maintain an action against the master for such injury. The general rule which gives immunity to the superior, results from considerations of justice, as well as of policy. The theory is that one who engages in the employment of another, for the performance of specified services for hire, takes upon himself the ordinary risks and perils incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly: *Paulmier* v. *Erie R. R. Co.*, 5 Vroom, 151; *McAndrews* v. *Burns*, 10 Vroom, 117.

To constitute persons fellow servants, they need not be engaged in the same place or in the same particular work. It is sufficient if they are in the service of the same master, engaged in the same common work, and acting for the accomplishment of the same general purpose. That to exempt the master, the servant to whose negligence the injury is to be attributed, need not be on a parity of service with the party injured, nor be engaged in the same particular work, is established by a long line of cases: *Charles* v. *Walker*, 38 L. T Rep. (N. S.), 773; *Searle* v. *Lindsay*, 11 C. B. (N. S.), 429; *Morgan* v. *Vale of Neath R. R. Co.*, L. R. 1 Q. B. 149; *Feltham* v. *England*, L. R. 2 Q. B. 33; 1 *Howell* v. *Landor Co.*, L. R. 10 Q. B. 62; *Wright* v. *New York Central*

R. R. Co., 25 N. Y. 562; *Wilson* v. *Merry*, 1 H. L. Sc. App. 326; *Warner* v. *Erie R. R. Co.*, 39 N. Y. 468; *Charles* v. *Taylor*, 3 L. R. C. P. Div. 492; *Lehigh Valley Coal Co.* v. *Jones*, 86 Penn. St. 432; Wharton on Negligence, Sec. 229 and notes.

But if there is negligence on the part of the master in selecting proper servants, or in furnishing safe appliances for the conduct of the business, the master is responsible.

The contention in these cases has been as to when the negligence of the servant can be imputed to the master. Authorities of great weight have held that if the master places the entire charge of the business in the hands of an agent, exercising no authority therein, he may be liable for the negligence of such agent to a subordinate employe, and that this rule prevails, whether the master be an individual or corporation. Otherwise, corporations would escape liability, owing to the fact that their business must necessarily be transacted by agents.

In *Mullan* v. *Philadelphia & Southern Mail Steamship Co.*, 78 Penn. St. 25, Justice WOODWARD delivered the opinion of the court, saying that "Where a master places the entire charge of his business, or a branch of it, in the hands of an agent, exercising no discretion and no oversight of his own, the neglect of the agent, of ordinary care in supplying and maintaining suitable instrumentalities for the work required, is a breach of duty for which the master should be liable. The negligence of the agent with such power becomes the negligence of the master."

In *Frazier* v. *Pennsylvania R. R. Co.*, 38 Penna. St. 104, the suit was by a brakeman, for personal injury caused by negligence of a conductor. The plaintiff rested his right to recover upon the alleged carelessness of the superintendent of the company whose duty it was to employ conductors, in the selection of this conductor.

Chief Justice LOWRIE delivered the opinion of the court, declaring that the superintendent stood for the company in this respect, and that his negligence was the negligence of the company.

Ardesco Oil Co. v. *Gilson*, 63 Penna. St. 146, was a suit by an employe who was injured by an explosion of stills. The

stills were constructed under the direction of the president of the company, who was not an expert in that business, and who was without the experience necessary for that work. The stills were found by the jury to be of insufficient strength, and for the imperfect construction of them by the president, the company was held liable. The officer having charge of their business was regarded, for all practical purposes, as the corporation itself.

In *Patterson* v. *Pittsbury & Connellsville R. R. Co.*, 76 Penna. St. 389, the plaintiff was conductor of the defendants' train and was injured by reason of the defective construction of the side track on which he was required to run out. The superintendent and foreman of the road had notice of the defect. The court charged the company with the negligence of the officer who had the care of the construction and maintenance of the side track.

In *Huntington & Broad Top R. R. Co.* v. *Decker*, 84 Penna. St. 419, the plaintiff was the wife of an engineer who was killed by the carelessness of the conductor. The recovery below was by reason of the alleged unfitness of the conductor, which was known to the superintendent of the road. The judgment was affirmed.

Justice WOODWARD declares the rule to be, that "Where a master places the entire charge of his business, or a distinct branch of it, in the hands of an agent, exercising no discretion and no oversight, the neglect of the agent of ordinary care in supplying and maintaining suitable instrumentalities, is a breach of duty for which the master is liable." *Mullin* v. *Philadelphia & Southern Steamship Co.*, 78 Penna. St. 25.

In Ohio, where one servant is placed by his employer in a position of subordination, and subject to the orders and control of another, and such inferior servant, in the discharge of his duties, is injured without fault of his own, by the negligence of his superior servant, the master is liable: *Cleveland & C. R. R. Co.* v. *Keary*, 3 Ohio St. 201; *Berea Stone Co.* v. *Kraft*, 31 Ohio St. 287.

But where no control is given to one over another, an action will not lie: *Whalan* v. *Mad River R. R. Co.*, 8 Ohio St. 249.

The Supreme Court of Missouri, in *Cook* v. *Hann. & St. Jo. R. R. Co.*, 63 Mo. 397, decided that a superintendent of work was a vice-principal of the railway company, and that his negligence, by which a teamster in the employ of the company was injured, was imputable to the company.

The same court held that an architect and superintendent who has general charge of the erection of a building, is not a fellow servant with those at work on the same. *Whalen* v. *Centenary Church*, 62 Mo. 326.

Justice COOLEY, in *Chicago R. R. Co.* v. *Bayfield*, 37 Mich. 205, held that the conductor of a construction train was not a fellow servant with a common laborer employed on the train.

In Tennessee, a section boss on a railroad is not regarded as a fellow servant of those who work under him: *Louisville, etc., R. R. Co.* v. *Bowler*, 9 Heisk. 866; *Nashville R. R. Co.* v. *Jones*, Id. 27.

The superintendent of a railway company, who has been clothed, by the board of directors, with power to act as the immediate representative of the company, its corporate executive officer, intrusted with the power of the board of directors, so far as relates to the management and control of its trains, is the *alter ego* of the company, and not a fellow servant with ordinary employes: *Washburn* v. *Nashville R. R. Co.*, 3 Head, 638.

The rule is ably discussed by Justice FOLGER, in *Laning* v. *New York Central R. R. Co.*, 49 N. Y. 521, where he says that "The duty of the master to the servant and the implied contract between them, is to the effect that the master shall furnish proper and adequate machinery and appliances for his work, and shall employ skillful and competent fellow servants, and shall use due and reasonable care to that end. This duty is to be affirmatively and positively fulfilled and performed.

The same view was expressed by Chief Justice CHURCH, in delivering the opinion of the court in *Flike* v. *Boston & Albany R. R. Co.*, 53 N. Y. 549, 553: "The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge, as master or principal,

without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and, consequently, liable for the manner in which they are performed. If an agent whose duty it is to employ servants or provide materials for the company, acts negligently in that capacity, his fault is that of the company, because it occurred in the performance of the principal's duty, although only an agent himself.

In *Ford* v. *Fitchburg R. R. Co.*, 110 Mass. 240, the Supreme Court of Massachusetts held that "The rule of law which exempts the master from responsibility does not excuse the employer from the exercise of ordinary care in supplying suitable instrumentalities for the performance of the required work, and the fact that it is a duty which must always be discharged when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation."

In *Brickner* v. *New York Central R. R. Co.*, 2 Lans. 506, after full review of the cases, the rule was declared to be that "Where a corporation, through its directors, commits the charge of its business to the hands of an agent, exercising no superintendence over him, the corporation will be liable to a subordinate employe for the negligence of such agent in employing co-servants, or in providing suitable appliances for the work." Affirmed in 49 N. Y. 672.

Malone v. *Hathaway*, 64 N. Y. 5, makes the distinction between natural and artificial persons—that it is only where the master withdraws from the management of the business, entrusting it to a middle man, or superior servant, or where, as in case of a corporation, the business is of such a nature that the general management and control thereof is necessarily committed to agents, that the master can be held liable to a subordinate for the negligent acts of one thus placed in his stead. Under this rule a foreman who had no delegation of power or control, but who was merely charged with special duties, was held to be a fellow-servant.

The doctrine of the case last cited is declared by Mr. Wharton, in his work on Negligence, sec. 229, to be in harmony with the American cases. The English courts have not as-

sented to this rule: *Howells* v. *Landore Steel Co.*, L. R. 10 Q. B. 63; *Wilson* v. *Merry*, L. R. 1 H. L. Sc. & Div. App. 326; *Feltham* v. *England*, L. R. 2 Q. B. 33.

In *Howells* v. *Landore Co.*, Chief Justice COCKBURN said that, since the decision of *Wilson* v. *Merry* the doctrine asserted in *Murphey* v. *Smith*, 19 C. B. (N. S.) 361, as to the liability of the master for the acts of a person whom he leaves as his vice-principal in the care of his business, is exploded.

In a case prior to this, the same learned judge had strongly inclined to a different view.

This question has attracted so much attention in England, that it has been made the subject of recent legislation.

There can be no difference between liability to a stranger and to a servant, for a person's own negligence or want of skill. No court has yet declared that a person either natural or artificial is not responsible for his own carelessness to his servant. On the contrary, every case has assumed that such responsibility existed. It has been universally conceded that there are certain duties which a corporation must perform toward its servants, such as the furnishing of proper instrumentalities and the using of due care in selecting co-servants, which can not be neglected without consequent liability. The struggle has been to determine when the want of care could be imputed to the principal—when he could be considered as present and acting or failing to act.

Inasmuch as a corporation can not act personally, responsibility for negligence can not exist unless it is held for the act of some agent or employe. Without a voice of its own, it must speak through another. Inanimate and without capacity to act by itself, its functions must be performed, and its obligations to its agents discharged, through some representative, whose act is its act, whose control is its control, and whose negligence is its negligence. The board of directors, the president—every one in employment, from the highest to the lowest—is an agent and servant of the company.

The purchase of materials and appliances, the employment and discharge of men, must be done by agents. Corporate powers can be exerted, and corporate duties performed, in no other way. Unless absolute immunity is granted to a corporation, there must be some executive officer who stands in

the place of the principal representing him and charged with his duty.

The case of *Paulmier* v. *Erie R. R. Co.*, 5 Vroom, 151, recognizes the liability of a corporation to an employe for negligence in those duties which it is required to perform as principal or master. The servant was injured by a defect in the construction of the trestle-work, but it does not appear for whose fault the company was held liable.

It is not necessary for the decision of the case in hand, to adopt a view as rigorous against corporations as that expressed in the cases cited, nor is it necessary to establish a rule applicable to all cases that may arise. No rule more favorable to the corporation can be adopted than to hold that it is present and acting in the person of its chief executive officer, the president. His neglect to perform those duties which devolve upon the company should be regarded as the neglect of the company itself. To this extent, at least, it is safe to carry the doctrine. While the master is not held as guaranteeing the absolute safety of machinery or appliances, provided for his employes or the fitness of co-servants, he is bound to observe such care as the exigencies of the situation reasonably require in selecting them. Any injury resulting to a co-servant from the failure of the company positively to perform this duty is actionable.

When the plaintiff engaged in the service of the defendant, the ordinary blasting powder was used, and under his contract with the company to labor as a miner, he assumed the risk of personal injury, in blasting with the ordinary agency used for that purpose. He did not agree to subject himself to hazard attending the use of an unusual and highly explosive substance, of the dangerous quality of which, as well as of the proper manner of applying it, he was wholly ignorant.

It appears that Seldon T. Scranton, the president of the defendant company, to whose care was committed the superintendence of the business of the corporation, in April, 1874, introduced the use of giant powder. It is clearly shown that it was a highly dangerous explosive, and that the proper manner of using it was not made known to the plaintiff, although printed instructions were in the possession of the company. Before allowing this new compound to be introduced, it was a duty which the company owed to the plaintiff

to ascertain and make known its properties and the mode of using it, either to the plaintiff himself, or to those under whose direction he worked. The obligation to do so rested upon Scranton, as the head officer of the company, and his neglect in that respect was the neglect of the company itself. It was gross negligence in the company to furnish such an article for a laborer's use without giving him the requisite information. Whether the company was aware of its dangerous quality or furnished it for use without having taken steps to obtain such knowledge, it is equally liable. It was a duty which the company, through Scranton, was bound to perform, to see that such reasonable care as the exigency of the case demanded, was taken, and to impart to the subordinates full information as to the manner of applying the new compound, before placing it in the hands of an ignorant laborer.

This obligation rested on the company itself; the president could not shift their liability by referring the matter to one of his subordinates. The effect of such a rule would be to substantially absolve a corporation from all liability.

There was a clear failure on the part of the president to use the care which, under the circumstances of the case, the law exacted from the defendant, and his neglect must be imputed to the company. The other questions discussed by counsel have been carefully considered. No reason appears to me why the verdict should be disturbed.

The rule to show cause should be discharged.

1. Nitro-glycerine explosion: *Caff* v. *Newark Co.*, 35 N. J. L. 17; *Parrot* v. *Barney*, 1 Saw. 423; *Parrot* v. *Wells, Fargo & Co.*, 15 Wall. 524.

2. Defendant liable for throwing rock on land of another without proof of negligence: *Hay* v. *Cohoes Co.*, 2 N. Y. 159; *St. Peter* v. *Denison*, 58 N. Y. 416; *Tremain* v. *Cohoes Co.*, 2 N. Y. 163.

3. Recovery for loss of time occasioned to parties compelled to quit work at intervals, on account of blasting operations in the vicinity: *Hunter* v. *Farren*, 127 Mass. 481.

4. Municipal liability in blasting sewers: *Murphy* v. *Lowell*, 128 Mass. 396.

5. Mining company held liable for damages on accident resulting from compelling its employes to experiment with new and untried explosives: *Spelman* v. *Fisher Co.*, 56 Barb. 151.

6. Unlawful storage of explosives amounts to nuisance, without regard to degree of care: *McAndrews* v. *Collerd*, 42 N. J. L. 189; *White* v. *C. C. Co.*, 5 Dill. 428.

7. Mental anxiety as an element of damages: *Wyman* v. *Leavit*, 71 Me. 227, and note to S. C. 36 Am. Rep. 303.

HANSON v. BOOTHMAN ET AL.

(13 East, 22. King's Bench, 1810.)

Bond to find coal—Sufficient search. Lessees of land and of coal found or to be found, covenanted to sink for coal as far as could and ought to be accomplished by persons acquainted with the nature of collieries, etc., and gave bond to pay such damages as umpires should award against them for breach of such covenant. The umpires awarded a certain sum in damages, and that lessees should sink pits, etc., in endeavor to find coal by a certain time. Defendants paid the damages and averred full efforts to find the coal and that none existed such as would pay for working. *Held*, that the plea showed a full compliance with the award, but leave was given to take issue on the sufficiency of the experiments.

Debt on bond for £5,000, dated August 16, 1806, with a condition reciting that whereas, by an indenture of lease, dated the 5th of July, 1805, the plaintiff demised to the defendant, for 57 years, all the mines of coal then already found, or which should or might thereafter be found, in any part of the plaintiff's estate, within Pendlebury in Lancashire; subject *inter alia*, to a covenant, that the defendants would forthwith proceed to sink for coal, in the wood and lowlands, as far as could and ought to be accomplished, by persons acquainted with the nature of collieries and as in such case was usual and customary, and immediately erect such fire engines as should be necessary for the above purpose; such pits to be sunk and fire engines to be erected ready and complete for working the veins and getting the coal, on or before the 24th of June, 1806, or, in default thereof, to pay to the plaintiff such sum, etc., as should be fixed by arbitration or umpirage. And it was agreed that in case of any difference between the parties, which should not be settled between themselves within one month, the matter of difference should be referred to two arbitrators, or in their default to an umpire, who should award what should seem to them to be just, etc. And further reciting the complaint of the plaintiff, that the defendants had made default in the performance of the covenant in the lease; and that the parties had agreed to submit the difference between them, on that account, to two arbitrators named (or in their default to an umpire); the condition was to abide and perform the award of the arbitrators (or umpire) of, and concerning the

damages, losses and delays, if any, sustained by the plaintiff, on account of the defendants not having, as the plaintiff alleged, performed their covenants; and also whether any rent, payment, or other satisfaction should be made to the plaintiff in respect of the premises, etc.

The defendants after oyer of the bond and condition, pleaded that the arbitrators made no award, but on the 3d of September, 1806, appointed an umpire, who made his award on the 29th of September, by which he awarded that the defendants had not performed their covenants in the lease, inasmuch as they had not proceeded to sink for the said coal as far as could and ought to be accomplished by persons acquainted with the nature of collieries; and had not erected such fire engines as were and are necessary for the working the mines and getting the said coals; nor completed the same for that purpose, on or before the 24th of June, 1806; and he awarded that in consequence of the non-performance and breach of such covenant in the lease, and in satisfaction of all losses, damages, and delay hitherto sustained by the plaintiff on account of such breach, the defendants should pay to the plaintiff £150, for and as a rent, and in lieu of the lord's part made payable by the said lease for the year ending the 24th of June, 1807; that the defendants should sink to and through the coal mines demised, and erect fire engines thereon ready and complete for working the said mines and getting the coals, according to the tenor of the lease, on or before the 24th day of June 1807; and in default thereof he awarded that until the same should be so done, the defendants should pay to the plaintiff the yearly rent of £200 as a compensation, and in lieu of the lord's rent or share reserved by the said lease, payable on the 24th of June and 25th of December; the first half yearly payment to become due on the 25th of December, 1807; and that so soon as the defendants should have sunk the said pits, erected such fire engines, and begun to get the said coals, according to the tenor and effect of the lease, the said annual rent or compensation should cease, and the defendants should begin to pay the lord's rent or share reserved by the lease, according to the quantity of coal from time to time gotten; and that when and as often as the lord's rent or share should exceed £200 in one year, the defendants should retain the over-

plus until they had reimbursed themselves the whole of what they should have paid by way of annual rent or compensation in lieu of the lord's rent before the colliery was begun to be worked, etc.

The defendants then averred that in consequence of the non-performance and breach of covenant as in the award mentioned, and in satisfaction of all losses, damages and delay hitherto sustained by the plaintiff on account of such breach, they paid to him the £150 in the award mentioned on the 25th December, 1806, and 24th June, 1807, according to the form and effect of the award; and that after the making of the award, and before the 24th of June, 1807, viz.: on the 1st of October, 1806, and on divers other days between that and the 24th of June, 1807, they did well and truly sink for coal in the wood and low lands demised, as far as could and ought to be accomplished by persons acquainted with the nature of collieries, and as in such cases was usual and customary, and were ready and willing to have sunk to and through, and would have sunk to and through the said coal mines, and to have completed, and would have completed such pits, and to have erected and completed and would have erected and completed such fire engines as should or might be necessary for working the said mines and getting the said coals, within the time limited by the award; but that at the time of making the said lease, and continually from thenceforth hitherto, there were not nor are, any such mines of coal in or under any part of plaintiff's lands within Pendlebury aforesaid as could or ought to be worked or gotten by any person acquainted with the nature of collieries, or as in such cases it was or is usual or customary to work or get, or as could or would have defrayed the necessary expenses of working and getting the same; all which premises the defendant ascertained and proved by due and sufficient experiments and trials then and there made, and gave notice thereof to the plaintiff; by reason whereof the defendants were prevented from sinking to and through the said mines, and from completing the said pits and engines within the time in that behalf limited by the award. There was another plea in substance the same; to both of which the plaintiff demurred generally.

LITTLEDALE, for the plaintiff, insisted that the plea did not contain any sufficient excuse for the non-performance of the award by the defendants. The parties referred to the umpire whether the covenant had been broken; and he has decided that it was broken, by the defendants not having proceeded to sink for coal as far as they could and ought to have done; that decides the question as to the breach of the condition: and then he awards that the defendants shall sink pits for coal, etc.; and that, until coal shall be gotten, they shall pay a certain rent to the plaintiff. This is no excess of the umpire's authority: he does not award anything impossible to be done; for the defendants may sink the pits, though it may not be effectual for the purpose of getting coal; and it is no answer, against the award of the umpire as to the breach of the covenant, to say that there are no coals, or none worth the expense of getting, under the demised premises.

LORD ELLENBOROUGH, C. J.—It might be no answer to the damages awarded for the breach of covenant for the time past, in not trying to get the coal, etc., on or before the 24th of June; but surely it is an answer to any future breach, that they had tried as far as they could and ought to do, in the judgment of persons of competent skill in such works, and as far as was usual and customary in such cases, and that no coal could be gotten. It is found upon competent trial to be impossible to get any coal fit to be worked; and no person can be bound to do impossibilities.

The other judges agreed; and BAYLEY, J., suggested that it would be better for the plaintiff, if the case would bear it, to take issue upon the sufficiency of the experiments made by the defendants; and leave was given to amend for that purpose, if upon inquiry it should be found there was any ground for it; otherwise judgment for the defendants.

RICHARDSON was to have argued for the defendants.

GORDON ET AL. v. DARNELL.

(5 Colorado, 302. Supreme Court, 1880.)

Practice—Bill of exceptions. If the bill of exceptions does not purport to contain all the evidence the Supreme Court can not inquire whether the verdict of the jury is supported by the evidence or not.

Title bond, giving option, construed as "nudum pactum"—Revocation—Performance. The execution and delivery of a bond conditioned to convey a mining claim upon payment or deposit of a certain sum within a given time, the bond not being signed by the obligee, containing no clause granting him possession during the option, and having no consideration expressed for the option given: *Held*, that until acceptance by the obligee, or the performance of some act equivalent to an election to purchase under the terms prescribed, such a bond is *nudum pactum*, and subject to revocation; *also*, that the taking possession under such a bond, and making improvements without objection from the obligor, would not render the bond irrevocable; nor could such entry be considered equivalent to an election to purchase, nor be construed into a performance.

Appeal from the District Court of Custer County.

The facts are stated in the opinion.

GEORGE S. ADAMS and J. W. WARNER, for appellants.

BLACKBURN & DALE, for appellee.

BECK, J.

The plaintiffs below, appellants here, were original locators of the Good Neighbor mining claim at Silver Cliff. On the 23d day of August, 1879, they executed and delivered to one John W. Lawrence, a bond in the penal sum of one thousand dollars, conditioned to convey the claim to him on payment to them, or upon the deposit by Lawrence in the Custer County Bank, in Silver Cliff, on or before the 23d day of October, 1879, the sum of four hundred and fifty dollars. The bond was not signed by Lawrence, contains no clause granting him the possession during the option, and no consideration is expressed for the option given.

Lawrence went upon the claim about the 2d of September, built an ore house and commenced to sink shafts thereon. On the 9th of September, he executed a title bond to the defendants, Darnell and Hodson. This instrument was conditioned to execute to them a deed upon payment, on or before December 8, 1879, of the sum of $25,000. Lawrence thereupon admitted Darnell to enter upon the claim and occupy it jointly with himself.

On the 12th day of September, two of the plaintiffs, Heister and Gordon, entered and commenced digging, when Lawrence and Darnell objected, and expelled them from the

ground, Darnell claiming under his bond from Lawrence, and Lawrence claiming under his bond from the plaintiffs.

This suit against Darnell and Hodson was instituted the next day, September 13th. Hodson was not served with process, and Darnell only appeared to the action.

The cause was tried at the October term of the District Court of Custer County, before the court and a jury, the trial resulting in a verdict for the defendant, Darnell.

The plaintiffs bring the cause here by appeal, assigning for error, *inter alia*, certain rulings of the judge in admitting and rejecting testimony, the granting and refusing of instructions, and the denying of plaintiffs' motion for a new trial.

We will observe in the first instance, that we are precluded from reviewing the judgment upon the evidence by a familiar and oft repeated rule of this court. The bill of exceptions does not purport to contain all the evidence. Hence, we can not inquire whether the verdict of the jury is supported by the evidence or not.

Some important questions, however, arise upon the record respecting the rulings of the court upon the trial, which we will examine.

The district judge appears to have taken an erroneous view of the legal effect of the title bond executed by the plaintiffs to Lawrence, and this, evidently, led him into the commission of sundry erroneous rulings during the progress of the trial.

A bond of this nature is, in the first instance, a mere option to the obligee, to purchase at any time within the period therein limited, upon simple compliance with the terms stated. Until such acceptance by the obligee, there being neither mutuality nor consideration, it imposes no obligation whatever on either party, and for that reason is subject to revocation by the maker at any time prior to acceptance. Such a bond lacks the elements of a valid and binding contract. It is not signed by the purchaser, and no consideration is expressed for the option given. Not being enforceable to any degree against the purchaser, he is equally incapable of enforcing it against the seller, for contracts to be obligatory upon either party must be mutual. Until acceptance by the obligee, or the performance of some act equivalent to an election to purchase under the terms mentioned therein, it is a *nudum pactum*. Its legal effect is that of a continuing

offer to sell, which is capable of being converted into a valid contract by a tender of the purchase money, or performance of its con litions, whatever they may be, within the time stated, and before the seller withdraws the offer to sell. But, if the offer be withdrawn before such election and tender of performance, it ceases to have any legal force whatever.

Where a money consideration for the option is expressed, or where the bond to convey requires the purchaser to improve and develop the property as a consideration for the option, or in part performance of the conditions of sale, and these terms have been duly complied with, a totally different case is presented from that where, by the terms and conditions of the instrument, nothing is to be paid and nothing done under it on the part of the purchaser until he makes his election to purchase. The former case contains all the elements of a binding contract, and the purchaser, although free to reject the offer of sale, may elect to accept within the time limited. In the latter case the offer must not only be accepted within the time mentioned, but before the option is withdrawn. Such acceptance, together with a tender of performance, renders the remedy mutual and entitles the purchaser to a specific performance. The minds of the contracting parties are said to meet on the happening of these events, and the offer to sell ripens into a valid contract, just as it would if made and concluded at the time of acceptance: *The B. and M. R. R.* v. *Bartlett*, 3 Cush. 224; *Corson* v. *Mulvany*, 49 Pa. St. 88; *Perkins* v. *Hadsell*, 50 Ill. 216; *Esmay* v. *Gorton*, 18 Ill. 483; *Estes* v. *Furlong*, 59 Ill. 300; *Vassault* v. *Edwards*, 43 Cal. 458; *Stevenson* v. *McLean* (Queen's Bench), 11 C. L. J. 229; *Routledge* v. *Grant*, 4 Bing. 653; *Cooke* v. *Oxley*, 3 T. R. 653; *Eliason* v. *Henshaw*, 4 Wheaton, 226; *Carr* v. *Duval*, 14 Pet. 76; Fry on Specific Perf., Secs. 64, 166, 167 177–179.

Upon the trial plaintiffs offered to introduce in evidence what purported to be a notice which had been served upon Lawrence, rescinding the contract. The defendants' counsel admitted that the notice was served on the defendants upon the day this action was instituted, but objected to the introduction in evidence of the notice, and the court sustained the objection. The notice not having been incorporated into the

record, we are not informed of its contents, and can, therefore, only say that testimony of this character was pertinent to the issue before the jury. It is not pretended that a tender or deposit of the purchase money was made until three days afterward, and whether there had previously been such part performance as to render the bond irrevocable was a question of fact, which was being tried.

When Lawrence was upon the stand as a witness for the defendant, plaintiffs' counsel asked him the question, "Did you, or did you not, previous to making the deposit mentioned, receive notice from plaintiffs, or any of them, that they had rescinded the contract, and that you need not deposit the money to their credit?"

This question was likewise objected to, and the objection sustained. This was clearly error, for the reasons above mentioned. As before observed, the judge evidently placed an erroneous construction on the bond itself, treating it as irrevocable.

Counsel for appellees attempt to sustain these rulings, and likewise certain instructions given to the jury, on the ground that Lawrence had entered under the bond and made valuable improvements; that Darnell, the defendant, was his assignee, whom he had let into joint possession with him, and that Lawrence having deposited the purchase money, as stipulated in the bond, within the time therein given, he was equitably entitled to a specific performance of the covenant to convey; and that if the possession of Lawrence was rightful, that of his grantee, Darnell, was equally so.

This position assumes certain facts to exist which were in dispute. The bond did not in terms require or authorize Lawrence to take possession; it did not require or authorize any shafts to be sunk or improvements to be made pending the option, and the plaintiffs offered to introduce testimony tending to show that they never authorized Lawrence or his grantee to enter into possession.

The plaintiff Heister was asked when upon the stand, "What permission, if any, did you give Lawrence and Darnell, or either of them, to work on the claim?"

Gordon, another plaintiff, was asked, "Did you ever part with your possession, or authorize any one to take possession,

of the Good Neighbor lode?" And to plaintiff Moorehead this question was propounded: "State whether or not you have ever given permission to defendants, or any other persons, to have possession of the Good Neighbor claim?" Objections were made and sustained to all of these questions, the effect of which ruling was to exclude from the jury such testimony as the plaintiffs may have been prepared to give, upon their respective oaths, concerning the manner in which, and the circumstances under which, possession was given or obtained of the mine. This was error.

Counsel for defendants say in their brief, that, "it is not pretended that Lawrence went into possession of the Good Neighbor, with the express permission of the plaintiffs, only that he went into such possession at or about the time of the purchase, with the knowledge of, and without objection from the plaintiffs; expended money in developing the claim, and made valuable improvements upon it with their knowledge and without any objection from them, and that they stood by and allowed this to be done, and allowed Darnell to make a contract of purchase from Lawrence, and be taken into joint possession of the premises, without objection and without notifying Darnell that Lawrence's possession was wrongful."

If these facts be admitted, they do not render the bond irrevocable, unless it can be said that they amount to an election to purchase and are in compliance with the terms of the contract. It can not be said that an entry of this character, unauthorized by the bond, and without the express assent of the plaintiffs, is such an entry as is equivalent in law to a sealing of the bond by Lawrence. Nor can it be considered equivalent to an election to purchase the mine, so far as the written contract is concerned, for that prescribes a different mode of electing, viz., the payment or deposit of the purchase money; and it is equally difficult to comprehend how taking possession and making improvements can be construed as performance in this case, at least under the written obligation in evidence, since none of its provisions contemplate such acts.

Certainly, if Lawrence, without further agreement with the plaintiffs, and of his own notion, went upon the premises and built an ore house for his own convenience, and sunk shafts

for the purpose of testing the value of the mine, in order to determine whether he would elect to purchase it on the terms offered, these facts would constitute neither election nor performance. Such acts would be simply for exploration and not designed to improve the property. The character of the acts being in dispute which were relied upon as making the contract binding on the plaintiffs, it was error to exclude the testimony which the plaintiffs had to offer on that subject. The acts themselves being unauthorized by the bond, the plaintiffs should have been permitted to testify whether or not they were merely voluntary on the part of Lawrence and Darnell.

Similar errors appear in the third and fourth instructions given to the jury.

The third instruction informs the jury in substance, that if the plaintiffs executed the bond, and if Lawrence took possession and spent money on the claim with the knowledge and without objection of plaintiffs, and by an arrangement with Darnell let him into joint occupancy with him; if they were in actual possession at the time suit was brought, and if Lawrence had deposited the purchase money since the institution of the suit, and on or before the 23d day of October, 1879, and notified the plaintiffs, then Darnell was entitled to hold the claim against the plaintiffs.

This instruction is faulty. It assumes to cover the whole case, but is not broad enough. No opportunity is afforded the jury to find, if the facts warranted, that the option to purchase was withdrawn before the bond became a binding obligation on the plaintiffs.

To make this instruction announce fully the law of the case, a proviso would have to be added, to the effect, that if the evidence disclosed that the taking possession and expending money were purely voluntary acts on the part of Lawrence, not being in compliance with the terms and conditions of any agreement between him and the plaintiffs, concerning the sale of said mine; and if the evidence further disclosed that the option to purchase was withdrawn by the plaintiffs, and Lawrence notified by them of the fact prior to the deposit, then in that case the verdict should be for the plaintiffs.

The same objections and the same observations apply to the fourth instruction given.

For the errors indicated, the judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

SMITH ET AL. v. REYNOLDS.

(1 Colorado L. R. 89, and 8 Fed. Rep. 696. U. S. Cir. Ct., 1880.)

Void for want of consideration. A bill for specific performance was brought, based upon a title bond by which the obligors bound themselves to convey the "Terrible Mine" to the obligees upon certain payments being made. *Held*, that the bond was without consideration and therefore without validity.

The complaint was a bill for specific performance, based upon a title bond executed by three of the defendants to the complainants, in pursuance of which they bound themselves to convey three fifths of the "Terrible Mine" to the plaintiffs, upon the payment of certain sums therein named, within a specified time. Before the expiration of the time the said three defendants had sold and conveyed the property to John H. Maugham, and he had conveyed to A. E. Reynolds. Reynolds set up in his answer that the title bond was given without consideration. The complainants excepted to this portion of Reynolds' answer.

HALLETT, D. J.

As to the exception to the separate answer of Reynolds, alleging that the bond executed by three of the defendants to the plaintiffs was a voluntary bond, executed without any consideration, in my opinion it is not well taken. This exception must be overruled. Such bonds are of no force or effect whatever unless carried out by the obligees tendering the whole, or some part, of the agreed price, and the obligors accepting the same. To say that such a bond is capable of being enforced is to assert that one party is bound, while the other is not. If the purchaser is not bound, neither is the vendor. It is not the case of a contract founded upon mutual promises, which is always enforceable. When there is a

promise to sell, but no promise to buy, there is no contract. It is a promise without consideration. Of course, if the seller, when it is still within his power to sell, accepts the money, or some part of it, he is bound to make the conveyance; or, if the consideration be that the obligee shall sink a shaft until mineral is struck, or that he shall do other work on the mine, the case would be different. In that event there would be no want of mutuality. It would be the case of an ordinary agreement, based upon a consideration.

But in the case before us the plaintiffs did not agree to take the property. Is it possible that Clark, Patton and Ottman were bound to sell, while Downs and Smith were not bound to buy? This I do not understand to be the law. I have always regarded this class of bonds as being without validity. I know there are some good lawyers who maintain that such a bond may be treated as a continuing offer during the time limited therein, and that the offer may be accepted at any time during that period. But this is not my view of the law. Mr. Thomas stated that he could furnish some authorities which lay down a different doctrine. I now think this part of the answer presents a good defense. At the final hearing, upon a more extended examination of the authorities, my views may be modified, but as at present advised, my conviction is that this bond is without validity.

1. A bond from a tenant to his landlord, to surrender fixtures, pay taxes, etc., runs with the land: *Hayes* v. *New York Co.*, 2 Colo. 273.

2. Bond to find water under land drained by coal mines: *Maguire* v. *Howard*, 40 Pa. St. 391.

3. Donation of municipal bonds to iron works; *held*, void: *Ohio Valley I. W.* v. *Moundsville*, 11 W. Va. 1.

4. A title bond, amounting only to an option to purchase, does not amount to a mutual obligation: *Finerty* v. *Fritz*, 1 M. R. 437.

POLLARD V. SHIVELY ET AL.

(5 Colorado, 309. Supreme Court, 1880.)

Location certificate. A recorded certificate of location is a statutory writing affecting realty, being in part the basis of the miner's exclusive possession and enjoyment of his mining location granted by the act of Congress of May 10, 1872. The purpose of description is to identify the claim with reasonable certainty.

Monuments control course and distance—Variance in the calls. The courses and distances of a survey must yield to its monuments, whether natural or artificial. While a stump, hewed and marked, might be adopted as a location post, the descriptive survey should give both its real and assigned character. When the call in a location certificate is for a post, parol testimony is inadmissible to show that while a post is called for, a stump was in fact established as a corner.

Parol evidence to explain ambiguities—Monuments. The general rule that parol evidence can not be admitted to contradict or control the language of a deed, but that latent ambiguities may be explained by such evidence, *held*, applicable to a location certificate. The rule is that where monuments are relied upon to control courses and distances, they must be found as called for.

Keeping up monuments—When necessary. Marking the boundaries of a claim operates to determine the rights of the claimant as against the government, and to notify third persons of his rights; and if a variation exists between the monuments and the courses and distances of the location certificate, it is necessary for the locator prior to patent to keep up his monuments to an extent that gives fair and reasonable notice to subsequent locators.

Side line posts. Posts placed opposite the discovery shaft 600 feet from one end and 900 feet from the other end of the claim, is a substantial compliance with the requirement of the statute that the side posts be placed in the center of the claim—as with the corner posts properly located, the boundaries of the claim, with side posts so placed, can be "readily traced" by them.

Appeal from the District Court of Clear Creek County.

L. H. SHEPARD, and ROCKWELL & BISSELL, for appellant.

R. S. MORRISON and JACOB FILLIUS, for appellees.

The action was in ejectment to support an adverse claim brought on behalf of the Glendower lode.

ELBERT, C. J.

This was an action brought by the appellees, Peter and

David Shively, against the appellant, Pollard, in the District Court of Clear Creek County, to recover possession of a certain portion of the Glendower lode, claimed by the appellant as a part of the Hardin lode, and embraced by him in his application for a patent therefor.

The Hardin lode was discovered in June, 1875, and, in the November following, was surveyed and staked and a certificate of location filed in the office of the register of deeds for Clear Creek county, by the discoverers, Packard and Krise, remote grantors of appellant.

The Glendower lode was discovered the 6th of December, 1878, was surveyed and staked the 20th of February, 1879. and a certificate of location filed the 21st of February, 1879.

On the 26th of August, 1879, Pollard, who had become the owner by purchase of the Hardin lode, filed a certificate of relocation thereof for the purpose, in the words of the certificate, "of more definitely defining the boundaries as originally staked out and filed, without waiver of any right acquired by virtue of said original location."

The discovery shaft of the Hardin was situated six hundred feet from the east end and nine hundred feet from the west end of the survey. Both the original location and the relocation varied from a regular parallelogram from the discovery shaft west, each diverging at a slight angle to the north. By the courses and distances of the original location certificate, the Hardin location did not interfere with or embrace any portion of the Glendower. By the courses and distances of the relocation, the west end of the Hardin was swung further to the north and overlapped a portion of the Glendower; the portion so overlapped constitutes the ground in controversy.

At the trial below the defendant based his case upon the assumption that there was a misdescription in the original certificate of location; that the courses and distances therein were erroneous; that they did not describe the ground actually surveyed and staked, and sought to control the courses and distances by monuments which, he claimed, were established at the time of the survey, and which brought the ground in controversy within the Hardin location. The verdict was for the plaintiff, and the defendant appeals.

The controversy here concerns chiefly two instructions given by the court, as follows:

"No. 1. The court instructs the jury that the defendant, under his location certificate *and the other evidence in this case*, can not claim any ground except that which is described in the original Hardin location certificate, and that none of the ground covered by the original location certificate is sued for in this case. No. 2. The court instructs the jury that unless they find that the locators of the Hardin lode marked the surface boundaries of their claim by six substantial posts, hewed or marked on the side or sides in toward the claim, and sunk in the ground, to wit: one at each corner and one at the center of each side line, the location was void as against any *bona fide* locator of the same ground, or any part thereof, who has complied with the law as to discovery and location of a mining claim, and that placing stakes upon the side lines of the claim opposite the discovery shaft, where the discovery shaft is six hundred feet west of the east end line and nine hundred feet east of the west end line, is not a substantial compliance with the law."

The first instruction, it is insisted, infringes the rule that monuments control courses and distances.

A recorded certificate of location is a statutory writing affecting realty, being in part the basis of the miner's "right of exclusive possession and enjoyment" of his mining location, granted by the act of Congress of May 10, 1872.

The purpose of the description in a certificate of location, as stated by the statute, is to "identify the claim with reasonable certainty." Identification of the subject-matter is likewise the purpose of all description in patents, grants and other conveyances of real estate. The description in each, being for like purpose, should be governed by like rules. That the courses and distances of a survey must yield to its monuments, whether natural or artificial, is a familiar doctrine: 3 Wash. R. P. *621, and cases there cited.

Negligence in making surveys, imperfect instruments, variations of the needle, roughness and unevenness of the ground, are some of the elements of uncertainty affecting courses and distances, and make obvious the propriety of the rule: *Ibid.*

It is only saying that, that which is more obvious and certain shall control that which is less so: *Clark* v. *Wethey*, 19 Wend. 320. Hence, generally in descriptions of boundaries, in degree of certainty, natural objects rank artificial marks, as artificial marks in turn, rank the courses and distances given in a deed: 3 Wash. R. P. *631.

The difficulty in the case at bar is not about the rule, but its application.

It will be borne in mind that the conflict between the two lodes is at the west end of the Hardin, and that the monuments there are those chiefly contested.

The evidence touching the original survey and its boundaries is conflicting.

The testimony of the plaintiff's witnesses, among whom was the surveyor who made the survey, tends to show that the courses and distances given in the original location certificate were correct, and, although the corner posts at the west end had disappeared, that they were actually placed at or near the points where the courses and distances would locate them. The east end corner posts and what were intended as the center posts, although not properly placed, were all found and identified by the surveyor, and compared with the courses and distances given for the east end.

No original monument was found at the northwest corner. Evidence was introduced by the defendant to show that a stake was originally placed at this corner, but the evidence also shows that it was not in existence at the time of the Glendower discovery or location, and consequently could not avail to control the courses and distances of the record, for reasons fully stated hereafter.

The monuments upon which the defendant relied to control the courses and distances of the original survey was a stump, standing at the southwest corner of the relocation, and claimed by him to be the southwest corner of the original location.

The certificate called for a post at this corner, but the defendant was allowed to introduce evidence to show that in point of fact a post was never placed at this corner, but that this stump standing in the right place was adopted as a substitute for a post, and marked accordingly.

The act of Congress of July 26, 1866 (14 Statutes at Large,

251), is silent as to how a mining claim shall be marked or designated on the ground.

The act of May 10, 1872 (Revised Statutes, Sec. 2324), provides that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of locators, date of location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim."

The Legislature, in 1874, passed a law supplementing the act of Congress, and prescribing more specifically how a mining claim shall be marked: Gen. Laws, 629.

Section 6 is as follows: "Such surface boundaries shall be marked by six substantial posts, hewed or marked on the side or sides which are in toward the claim, and sunk in the ground, to wit: One at each corner, and one at the center of each side line. Where it is practically impossible on account of bed-rock to sink such posts, they may be placed in a pile of stones; and where in marking the surface boundaries at a claim any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such posts at the nearest practicable point, strictly marked to designate the proper place." Such statutory monuments substantially complying with the requirements of the law, would control courses and distances so that where there was a variation between the courses and distances given in the certificate of location and the monuments on the ground, the latter would prevail.

If in the survey of a mining location a stump of sufficient size and stability stands at a point where a statutory post should be located, I see no good reason why it should not be hewed, marked, and adopted as a location post. In such case, however, the descriptive survey should give both its real and assigned characters, otherwise it would not satisfy the call of the location certificate. Where there was no variation between the monuments and the courses and distances, the failure to so designate it would perhaps, be unimportant, but in case of variation it would be of prime importance. In

this case the call is for a post at the southwest corner, and it is insisted that parol evidence is admissible to show that while a post is called for, a stump was in fact established as a corner.

Courts have gone far in the admission of parol evidence in the matter of uncertain and disputed boundaries, but I am unable to see how this demand of the defendant can be sustained on principle. The certificate, like a deed, must be construed *ex visceribus suis.*

When the intent is clearly expressed, no evidence of extraneous facts or circumstances can be received to alter it: 3 Wash. R. P. 400, 404; *Bagley* v. *Morrill*, 46 Vt. 99.

The general rule stated more fully is, that parol evidence can not be admitted to control or contradict the language of a deed, but latent ambiguities can be explained by such evidence. Facts existing at the time of the conveyance and prior thereto, may be proved by parol evidence, with a view of establishing a particular line as being the one contemplated by the parties, *when by the terms of the deed* such line is left uncertain: 3 Wash. R. P. 401; *Drew* v. *Swift*, 46 N. Y. 209; *Claremont* v. *Carlton*, 2 N. H. 369; *Peaslee* v. *Gee*, 19 N. H. 277. There is neither latent ambiguity nor uncertainty in the terms of the certificate, to bring it within the meaning of the rule.

The call of the certificate is for a post; a stump does not answer the call. If parol evidence is admissible to show that a stump and not a post is the actual corner, it would be equally competent to show a pile of stones or any other monument uncalled for. This would not be construing the calls of a survey, but making them; it would not be an application of the rule that monuments control courses and distances, but an infringement of the rule that in the absence of latent ambiguity a deed can not be varied or contradicted by parol evidence: It would not be controlling courses and distances by monuments, but controlling both by parol evidence: *Claremont* v. *Carlton*, 2 N. H. 369.

The rule is, that where monuments are relied upon to control courses and distances, they must be found as called for: *Bruckner* v. *Lawrence*, 1 Doug. (Mich.), 19; *McCoy* v. *Galloway*, 3 Ohio, 383; *Seaman* v. *Hogeboom*, 21 Barb. 399; *Finley* v. *Williams*, 9 Cranch, 164.

In the case of *McCoy* v. *Galloway*, *supra*, it was *held*, that where the patent called for a tree of one kind, it was not competent to show a tree of another kind. In *Bruckner* v. *Lawrence*, *supra*, it was held that a marked tree did not satisfy the call for a post.

The court say: "The proposition was not to prove to the jury that there was a disagreement between the courses and distances, and the monument and boundaries as given in the patent, and as they are found on the land, but to show that there was an actual line on the ground not described or called for in the patent, but in fact intended by the surveyor Greely, as one of the boundaries of the plaintiff's grant. To admit parol proof of a marked line nowhere mentioned in the deed, but entirely variant from its calls, would serve to render title to real estate dependent, not on deeds of conveyance and the language of the grantor, and courses and distances and monuments, but on the mere memory of witnesses."

In this view, the evidence introduced by the defendant, showing a monument other than the one called for, was not competent, and in the absence of any other monument or monuments to control the courses and distances of the original survey, there was no error in the first instruction. The defendants' case was the same as if no monuments had been given or called for. In such case parol evidence is not admissible to control the courses and distances: 3 Wash. R. P. 403; *Drew* v. *Swift*, 46 N. Y. 209; *Bagley* v. *Morrill*, 46 Vt. 94.

The last line of the instruction, viz.: "that none of the ground covered by the original location certificate is sued for in this case," would be objectionable had not the fact which is stated been admitted.

The instruction was equally justified in another view of the case.

Marking the boundaries of the surface claim as required by statute is one of the first steps toward a location. It serves a double purpose. It operates to determine the right of the claimant as between himself and the general government, and to notify third persons of his rights. Another, seeking the benefits of the law, going upon the ground, is distinctly notified of the appropriation, and can ascertain its boundaries.

He may thus make his own location with certainty, knowing that the boundaries of the other can not be changed so as to encroach on ground duly appropriated prior to the change. The prevention of frauds by swinging or floating, is one of the purposes served.

The record also serves a double purpose. As between the claimant and the government it preserves a memorial of the lands appropriated, after monuments, in their nature perishable, are swept away. It also supplements the surface marking, in giving notice to third persons: *Golden Fleece, etc.*, v. *Cable Consolidated, etc., Co.*, 12 Nev. 312; *Gleason* v. *Martin White M. Co.*, 13 Nev. 471.

Counsel for the appellant submitted to the court below, in their first instruction, and urge here the following proposition:

"That when a lode is marked as required by law, it is to be presumed such marking is sufficient to notify all persons of the appropriation of the ground within the surface limits of such boundaries, and a person is not bound in law to keep the corners of his claim marked and in the position they were originally placed; that when a claim has been lawfully and properly located, the law presumes it will remain so, and that all subsequent owners have at least constructive notice of the prior appropriation of the ground thus located, even though as a matter of fact they had no such notice."

We are dealing with claims, not patents or grants, where the fee has passed.

Whether a claimant with a true record must keep good his surface monuments, we need not say; the record in this case on the theory of the defendant was not a true record.

Where there is a variation to any considerable extent between the courses and distances of the location certificate and the monument established on the ground, the record, with its misdescription, in point of fact, gives no notice of the ground actually appropriated. If the monuments are swept away, no search, no exercise of prudence, diligence or intelligence would advise the subsequent locator of the prior appropriation. In such case the rule demanded by the defendant would work the greatest injustice and hardship, and be an interpretation of the law in the interest of erroneous records and indo

lent claimants. The record failing in its constructive notice, I think it just to insist that the statutory monuments shall be found performing their statutory and essential duty of actual notice, and to say that where a variation exists between the monuments and the courses and distances of the location certificate, it is necessary, prior to patent, for the locator, as against subsequent locators to keep up his monuments to an extent that gives fair and reasonable notice. In other words, a claimant who has not kept up his boundary posts will not be permitted to show the courses and distances of his recorded location to be erroneous where the rights of an intervening locator without notice will be prejudiced.

Tried by this rule, the defendant had no case, and the first instruction was justified.

At the date of the Glendower location there were no monuments in existence at the west end to warn the plaintiff that the ground had been already appropriated, neither were there any center stakes at the center of the side lines. The only monument claimed as in existence at that time at the west end, where the conflict arises, was a stump partially blazed and imperfectly marked in pencil. The certificate instructed the subsequent locator to look for a post at this corner; it does not advise him that a stump had been utilized as a post.

If the pretensions of the defendant are to be allowed, there would be no protection for a subsequent locator against swinging locations, an evil against which the strict requirements of the statute were intended to protect.

It was therefore competent for the court, the facts being undisputed, to say to the jury that the defendant, not having maintained his location monuments so as to give notice of the ground appropriated, that he could not claim ground other than that which was described in his record as against a subsequent locator.

The second instruction given by the court was objectionable. The requirements that the side posts be placed in the center of the side lines is satisfied if they be substantially at the center; where there is a discrepancy of an hundred and fifty feet, as in this case, they can not be said to be in the center.

I think it is too much to say, however, the claim being

otherwise marked as required by statute, that the failure to place the side posts in the center of the side lines will invalidate the location; such an omission might exist, with all the corner posts properly placed and the lode exposed and worked the entire length of the lode.

It would be an unnecessarily harsh and unreasonable construction of a beneficent statute.

It is reasonable to say, however, that the statutory requirements respecting the marking of the surface boundaries with posts, are so far imperative as to require that the boundaries may be, in the language of the statute, "readily traced" by them, and that the notice which the statute contemplates and seeks by and through them may not be substantially impaired by any omission.

As, independent of this instruction, the defendant had no case, the giving of it was error without prejudice.*

It is not necessary to examine any of the other assignments.

The judgment of the court below is affirmed, with costs.

Judgment affirmed.

MCGEE ET AL. V. STONE ET AL.

(9 California, 600. Supreme Court, 1858.)

Mistake—Estoppel—Subsequent purchasers. A disputed boundary line between the claims of two mining companies was finally fixed by mutual consent, and the property passed to subsequent purchasers; it was then discovered that the settlement was based upon a mutual mistake as to the true course of the line, but the purchases had been made with a view to the compromise line. *Held*, that the parties were estopped from disputing the correctness of the compromise line. Where one of two innocent parties must suffer, he who committed the mistake must bear the loss.

Appeal from the District Court of Sierra County, Fourteenth Judicial District.

The opinion states the facts.

* NOTE. The instruction was in fact given merely *pro forma* in the court below to raise the question in the Supreme Court.

William Stewart and A. Platt, for appellants.

McConnell & Niles, for respondents.

Burnett, J., delivered the opinion of the court—Terry, C. J., concurring.

This was an action to recover the possession of certain mining claims. The plaintiffs compose the Star Point Company, and the defendants the Michigan Company. The Star Point Company consisted originally of four members, who located the claims in 1854—one for each member of the company, and one by right of discovery—making five claims in all, each fronting one hundred feet and running back four hundred feet. The Michigan Company located their claims with and adjoining those of plaintiffs, on the next day. For some time after the locations, the miners of that locality considered the front ground only as containing gold; but, subsequently, they became convinced that the heavier deposits would be found under the hill, lying back of the first locations. A meeting of the miners of that vicinity was held in August, 1855, at which it was agreed that claims should be extended back to the summit of the hill, in the rear. The controversy in this case regards the line between those two companies. The plaintiffs insist that the line was agreed upon by mutual consent, in 1855, while the defendants insist that such agreement did not bind the Michigan Company, as it was not agreed to by all the members, and that the agreement was founded upon a mistake of facts. In the court below, the defendants had judgment, and the plaintiffs appealed. The errors assigned go to the giving of a certain instruction, at the request of the defendants, and in refusing the plaintiffs a new trial.

The fourth, sixth, and ninth instructions, embrace substantially the same principle. The ninth is in these words:

"That, if the jury believe, from the evidence, that the stake set at the point represented on the map as "B," at the meeting of August, 1855, was placed there under a *mistake* as to the true boundaries and corners, then that the Michigan Company are not bound by such stake or corner."

There was some apparent, though very little of any real contradiction in the testimony as to the leading facts of the

It appears that at the meeting of the miners of that locality, in August, 1855, it was agreed that the Star Point Company, being the original locators, should first designate their lines, extending their original claims back to the summit of the hill, and that the adjoining companies should afterward designate their lines. One or more members of other companies went upon the ground, and, by mutual consent, marked a tree, as designating the southern extension line of the Star Point Company. From this point they went north to a point near a large rock, to designate the line between these two companies. The point first selected was not satisfactory to the Michigan Company; but, finally, a stake was set, by mutual consent, at the point marked "B." It seems very clear from the testimony, that it was supposed by all parties that this stake was in range with the northern line of the Star Point Company's original claims. But in this they were mistaken, as it turned out, upon actual survey, to have been too far north. This line was acquiesced in by both companies for about two years, and was never disputed by the Michigan Company, until they found, from actual survey, that they had by mistake crossed this dividing line with their tunnel. In the meantime, the present members of the Star Company had, *bona fide*, purchased the shares of the former owners.

It is not necessary to determine whether this mistake, in designating the dividing line, could be corrected as between those who were members of the two companies at the time it was made. The question now arises between *subsequent purchasers.*

The learned counsel for the plaintiffs insist that conceding the members of both companies, at the time, were mutually mistaken as to the true course of the line between the two companies, the Michigan Company is estopped from disputing that compromise line as against the plaintiffs. If this position of the counsel be correct, the instructions of the court below were erroneous.

In the late case of *Mitchell* v. *Reed* (9 Cal. 204), we had occasion to examine the doctrine of estoppel. In that case we held that "the particular intention with which the declaration was made, is not material, except, perhaps, where the communication is confidential. It is the fact that the decla-

ration has been acted upon by others that constitutes the liability to them."

There was no pretense of fraud on either side, in adjusting the line between the two companies. The intentions of both parties were innocent, and both were mistaken. Since that time other innocent parties have purchased, with a view to this compromise line. It seems that all the three members of the Star Point Company have since sold their shares to the present plaintiffs, and that similar transfers have been made by most of the three members of the Michigan Company; so that the controversy on both sides is substantially between subsequent purchasers, who have all purchased with a view to this line.

Under the circumstances of this case we can not see how the instructions of the court could be sustained. Where one of two innocent parties must suffer, he who committed the mistake must bear the loss. It is but just to say that the learned judge of the district court expressed great doubts as to the correctness of some of the instructions given at the request of the defendants, and overruled the motion for a new trial, with the view of having the question decided by this court.

The twelfth instruction given at the request of defendants seems to have been erroneous. The question was one simply between these two companies, and the compromise line would bind them whether the claims of the plaintiffs would be good or not, as between them and third persons, who were not parties to this suit, and under whom neither the plaintiffs nor defendants claim.

It is unnecessary, and would not be proper for us to decide whether the court properly refused the application for a new trial upon the ground that the verdict was contrary to the testimony. Under the instructions of the court, the jury could not well have found otherwise.

Judgment reversed, and cause remanded for further proceedings.

HUFFMAN v. HUMMER.

(18 New Jersey Eq. 83. Court of Chancery, 1866.)

Description—Ambiguity. A contract to convey land, bounded on the south by a line ten paces north of certain quarries, the face of the quarries being irregular, but having a general east and west course held to mean a straight line from a point ten paces north of the east, to a point ten paces north of the west extremity of the quarries.

Waiver—Specific performance. A written contract to sell and convey certain premises may in equity be waived by parol, but such parol waiver must be clear and explicit, and the refusal of one of the parties to accept of a conveyance, unless the premises were described according to his understanding of the contract, is not such a waiver, and he may insist upon a specific performance of the contract.

Laches—Law and equity. A party who has a contract for certain premises, the price to be paid on the execution of the conveyance, is not bound at law to pay or to offer to pay until the deed is properly executed; but equity requires one seeking a specific performance to show himself ready to perform, but the refusal of the other party to convey, dispenses with any further tender of money or readiness to perform.

This cause was brought on for final hearing, upon bill, answer, and proofs.

VAN FLEET, for complainant.

BIRD and G. A. ALLEN, for defendant.

THE CHANCELLOR. (ZABRISKIE.)

This suit is for the specific performance of a contract to convey lands.

The contract was in writing, signed and sealed by both parties, dated October 6, 1864, to convey the lands on or before the 1st day of April then next; part of the consideration was paid, and the complainant put in possession of the premises; he had made improvements, and cut wood and timber, and done other acts of ownership. The price to be paid was one hundred dollars per acre. One of the two tracts is stated to be, "that part that came off the Stout farm, north of the lime quarries; the line is to run ten paces north of said quarries; to all the land between the mill road and Euphemia Philhower's land on the west, and her line on the north, supposed to be about eighteen acres." The boundaries on the north and east and west, are certain and definite. The lime

quarries on the south are part of the tract which the defendant reserved and a dispute arose between the parties about the location of the line described in the agreement, "to run ten paces north of said quarries."

In February or March, 1865, the complainant had this line run by a surveyor, in the absence of the defendant, who was sent for, but being absent from home, did not receive notice of the survey. The defendant when he learned the location of the line, disapproved of it as different from the line in the contract, and meeting the complainant on the 15th of March, in a conversation about the matter, told him that the line was not according to the contract; the complainant insisted that it was, and that he would require a conveyance according to that line; and, according to some of the testimony, said that he would not take it in any other way; but he said to the defendant, on leaving, "we will settle this some other time." The defendant made no survey or computation of the quantity of land, nor prepared nor executed any deed on or before the 1st of April; the property was incumbered by a mortgage and a judgment which were unpaid. The agreement required the complainant to pay the price "on executing of the said conveyance." Neither party tendered himself ready to perform the agreement on or before the 1st of April. On the 3d of April, the defendant agreed to convey the premises to Euphemia Philhower, who paid him $400 on account, for which he took her note. She knew, at the time, of the contract with the complainant. On the 6th of April, the complainant having heard of the sale to Mrs. Philhower, sent his son-in-law to the defendant, and notified him that he was ready, and had been for some weeks ready, to receive and pay for the property, and requested him to convey it. The defendant answered that the conveyance was not ready and would not be ready; that he had sold the land to Mrs. Philhower. The complainant, without further demand or tender, filed the bill in this cause, having first purchased the mortgage on the property which was assigned to him.

The difference about the south line arose from the fact that the face of the quarries mentioned in the agreement, and which had been worked from the south, run in a direction generally from east to west, or nearly so, from Mrs. Philhower's line on the east, until within about one chain of the western

boundary or mill road; here they had been worked to some extent for more than a chain north of the general direction of the face of the quarry. The line run by the complainant's survey was ten yards north of the general direction of the face of the quarry, disregarding this part at the west side, and it run through this part, leaving a large portion of it north of the line. The defendant insisted that the agreement, by its true construction, calls for a line running ten yards north of all the quarries.

The defendant resists the claim of specific performance on these grounds:

1. That the agreement applied to the premises is ambiguous and uncertain.

2. That, if his construction of it is correct, the complainant by the notice given in March, that he would not perform it except as he construed it, discharged the agreement.

3. That complainant was guilty of laches in not tendering the money and demanding a deed on the 1st day of April.

1. As to the ambiguity. I have no doubt that the word quarries here means the face of the quarries; it is the usual meaning of the word as applied to quarries opened and worked, and the other parts of this contract show that the word was used here in that sense. It is more difficult to determine what is meant by "a line to run ten paces north of the quarries" when the face of the quarries is not only jagged and irregular in the part having a general direction from east to west, but near its western terminus runs for three times ten paces north of the line of general direction.

But the object of these words in locating that line was to reserve to Hummer all his lime quarries, and ten paces north of the face as then quarried, for future use. This can not be affected by adopting a line that will pass south of the face of any part.

The language "the line," in such connection means a straight line, one line, and not many lines. In this case a line drawn from a point ten paces north of that part of the face of the quarry near the mill road, which extends the furthest north, to a point ten paces north of the face of the quarry, at its eastern extremity, near Mrs. Philhower's line, will answer both the language and the object of this description; it is the

only line that will, and therefore is the line required by the agreement. I am, therefore, of opinion that this contract is not void for uncertainty.

2. Although this construction is not the one put upon the contract by the complainant in his interview with the defendant on the 15th of March, I do not think that he is barred of his remedy in this suit by what was then said. A written contract, especially one required by statute to be in writing, can not be waived or discharged by parol, at law, nor in general, in equity. But in equity this case is one of the exceptions to that rule. When the complainant has, by parol, waived or discharged a contract, and the defendant by such action, has entered into obligations inconsistent with its performance, it is an equity that will bar the remedy by specific performance: Fry on Spec. Perf., Sec. 693; *King* v. *Morford*, Saxt. 274; *Stoutenburgh* v. *Tompkins*, 1 Stockt. 332; *Stevens* v. *Cooper*, 1 Johns. Ch. R. 429; *Baldwin* v. *Salter*, 8 Paige, 473; *Backhouse* v. *Mohun et al.*, 3 Swanst. 434, note.

But such parol waiver or discharge must be clear and explicit, and proved beyond doubt. In this case the conversation on March 15th relied upon a waiver of the contract, was not intended as such, and can not be so construed. The complainant insisted on his construction, felt certain and positive that he was right, and avowed his intention to adhere to it, and not to perform the contract otherwise. Taken by itself it was no discharge or waiver; but when accompanied by the words which the defendant himself testified were used by the complainant in parting "we will settle this some other time," it is very clear that it was not intended as a discharge of the contract, and was not received as such. Few contracts would stand in this court, if such an insistment of the negotiations about their executions should be held to discharge them: Fry on Spec. Perf., Sec. 698.

3. The laches in this case is not such as will defeat the remedy. It may be well doubted if there was any laches at all. The defendant bound himself to convey, on or before the 1st day of April, the complainant to pay, on the deed being executed; until the deed was properly executed, he was not bound to pay, or to offer to pay. He was then not in default at law on his contract. But equity requires that a complainant,

seeking for specific performance, should have shown himself ready, anxious, and eager to perform his part; but in this case there was no laches of the complaint.

Any further tender of the money, or readiness to perform, was dispensed with by the answer given by the defendant to the complainant's agent on the 6th of April; he said he would not convey the land, and had sold it to another.

There was no laches in bringing suit; the bill was filed in fifteen days, not more than the time proper to be taken by careful counsel in preparing a bill in such cases.

There must be a decree for specific performance, and a reference to a master to ascertain and settle the boundaries, the quantity of the land, and the amount to be paid above the sum already paid, and the incumbrances.

STOAKES ET AL. V. MONROE ET AL.

(36 California, 383. Supreme Court, 1868.)

Fixing bounds by proof of neighboring lines. When claims are located by lines parallel to each other, the disputed line of any claim may be settled by proof of the existence of the neighboring lines, to which the disputed line is known to be parallel.

Requisites of newly discovered evidence. Newly discovered evidence, upon which a new trial is sought, must not be merely cumulative, nor such as could readily have been obtained at the original trial; it must be material and not in the mere nature of impeachment of a witness; and so important that it may reasonably be inferred that it would, if produced, result in a different verdict.

Appeal from District Court of Nevada County.

Plaintiffs had judgment below, and defendants appealed from the order denying new trial.

The opinion states the facts.

JOHN R. MCCONNELL, for appellants.

A. A. SARGENT, for respondents.

By the Court, CROKETT, J.

The plaintiffs are the owners in possession of a mining claim known as the "North Star," and the defendants are the owners in possession of a contiguous claim, known as the claim of "Lott & Co." or "Lott, Ganett & Co." The action is for damages for an alleged encroachment upon and injury to the plaintiffs' mining ground by the defendants, and for a perpetual injunction to prevent future encroachments. The answer denies that the plaintiffs are the owners or in possession of the *locus in quo*, and avers title in the defendants. The plaintiffs' location was prior to the defendants', and its regularity is not questioned; but its boundaries, except on the north, are disputed, and the contest relates only to boundaries. On the trial the verdict and judgment were for the plaintiffs, and the defendants moved for a new trial, chiefly on the ground of newly discovered evidence. The motion was denied and the defendants have appealed. The reversal of the judgment is urged on the sole ground that the court erred in denying the motion for new trial.

The northerly line of the plaintiffs' claim is not disputed, nor that it is bounded on its easterly and westerly sides by lines nearly or entirely parallel to each other. But the contest is as to the precise location of these lines, the plaintiffs maintaining that taking the northern line as a base, the lateral lines, according to their true location, include a large portion of the mining ground claimed by the defendants; whilst the defendants insist that the proper location of these latter lines is further toward the east; and if so located, they would include only a narrow strip off the easterly side of the defendants' ground.

On the trial it appeared that next easterly of the plaintiffs' claim is located the claim of Webb & Co., or, as it is some times called, of Smalley & Co., and next easterly of this is the Minnesota or Halpin claim. The Minnesota was first located, then Webb & Co., then the North Star (the plaintiffs' claim), and lastly the defendants' claim. On the trial, testimony was introduced by the plaintiffs, tending to show the location of the westerly line of the Minnesota claim, and rebutting testimony was put in by the defendants, tending to prove that this line was further toward the east than claimed by the plaintiffs. The testimony as to the location of this

line was conflicting—Halpin, a witness for the plaintiff, and one of the original locators of the Minnesota claim, testifying positively to the location as claimed by the plaintiffs; whilst Webb, a witness for the defendants, and one of the locators of the claim of Webb & Co., testified as positively to the location as claimed by the defendants. We do not perceive how the location of this line was in any respect pertinent to the issue, or could cut any figure in the case, unless it be on the theory that the claim of the plaintiffs was bounded on the east by the claim of Webb & Co., and that the east and west lines of the last named company were parallel with each other, and that the east line thereof was coincident with the west line of the Minnesota claim. Assuming these to be the facts, proof of the correct location of the west line of the Minnesota claim would establish the proper location of the east line of the plaintiffs' claim, and we infer it was upon this theory that proofs were offered on both sides as to the proper location of this line.

On the motion for new trial, several affidavits were relied upon by the defendants to establish the fact that since the trial they had discovered for the first time conclusive evidence of the true location of the *easterly* line of the Minnesota claim, and that inasmuch as the easterly and westerly lines of that claim were parallel, or nearly so, the newly discovered evidence fixing the easterly line would of necessity determine the true location of the westerly line; that the line as thus ascertained, is the same line to which Webb, a witness for defendants, testified on the trial, and is a more easterly line than that deposed to by Halpin, a witness for the plaintiffs. These affidavits show that, starting from the northeasterly corner of the Minnesota claim, they traced the easterly line by means of marked trees, with ancient notches and blazes, partially overgrown with new wood, underneath which were letters in red paint corresponding with the initials of the Minnesota Company; that the southerly line was partially traced in the same way; and that assuming the easterly line thus traced to be the true line, the distance from the southerly end of it to the southerly end of the western line as located by Halpin, the plaintiffs' witness, would exceed the true width of the claim by some five or six hundred feet,

and the lateral lines would not be parallel, as they should be. The plaintiffs filed in rebuttal the affidavit of Halpin, the original locator of the Minnesota claim, who deposes that the easterly line, as described in the other affidavits, was not the easterly line of the claim; that he used no red paint in defining the boundaries, and that the true line was further toward the west. On this showing the district court denied the motion for new trial, and the correctness of this ruling is the only question discussed in the briefs.

It is well settled that to entitle a party to a new trial on the ground of newly discovered evidence, it must appear, first—that he used reasonable diligence to discover and produce the evidence at the former trial, and that his failure to do so was in no degree the result of his own *laches;* second—that the newly discovered evidence is not simply cumulative; third—that it is not sufficient if its only office be to impeach an adverse witness; fourth—that it must be material to the issue, and of so important a character as to satisfy the court that it may reasonably be inferred the verdict would have been different if the newly discovered evidence had been in on the former trial.

The counsel for plaintiffs insist that the case made by the defendants is defective in each of these particulars; and on the first point, particularly, we think there is no answer to his argument. The defendants' theory is, that all these claims were consecutively coterminous, and bounded on the east and west by lines nearly or entirely parallel with each other; and inasmuch as the Minnesota was first located, they must be presumed to have known that it was important on their theory to establish on the trial the true location of this claim. But they contented themselves with offering evidence as to the location of the western line only, and they now propose to fortify that evidence by showing the location of the parallel eastern line, and thereby establishing the true location of the western line. But why was not so important a fact proven on the former trial? The northern line was well known, and there stood the line of trees, notched and blazed, with the letters in red paint, all of which could have been discovered and proved without the slightest difficulty. Any one of ordinary prudence seeking to establish the loca-

tion of the western line would naturally have sought to find the parallel eastern line as a circumstance of preponderating might. The feeblest effort would have discovered it. The only excuse offered for this negligence is contained in the affidavit of the defendant Monroe, in which he says: "Before said trial I knew of the existence of the Minnesota claim, but did not, of my own knowledge, know of the exact situation of the lines of such claims. I had, however, made inquiries relative to the west line thereof, and also relative to the east and west lines of the Webb and Smalley claims, of all persons whom I supposed to be acquainted therewith. I ascertained, as I supposed, beyond doubt, that the Webb and Smalley east and west lines ran, as the witness, W. H. Webb, testified at the trial; also, that the Minnesota west line ran to the stump and fallen tree mentioned by Webb. I had never heard this fact, or the direction of the Webb and Smalley lines disputed or doubted before the trial." He then proceeds to say that he was greatly surprised to hear at the trial, from the witness Halpin, that the west line of the Minnesota and the east line of the Webb and Smalley claims ran as testified to by that witness. The substance of the statement is that he made no inquiry as to any of the lines of the Minnesota except the west line, and became satisfied that line was where Webb located it; that he had never heard that fact disputed or doubted before the trial, and was surprised to hear Halpin testify to the contrary. This is not the sort of diligence required from suitors. It will not do for them simply to satisfy themselves as to an important fact in the case, and to assume it as a conceded fact, because they never heard it disputed. A party must be prepared to *prove* the material facts of his case unless they are admitted in the pleadings, or by express stipulation. If such excuses as these, for a failure to produce at the trial proofs which were within the power of the party, be tolerated, there would be no reasonable limit to applications for new trials on similar grounds. We think no sufficient diligence was shown, and that the motion was properly denied for this reason. It is perhaps unnecessary to discuss the other propositions involved in the motion further than to say that, if for no other reason, we should be most reluctant to disturb the ruling of the court below on the facts appearing

in the record, not being satisfied that there is reasonable ground to believe that the newly discovered evidence would change the result on another trial.

Judgment affirmed and remittitur ordered to issue forthwith.

Judgment affirmed.

OVERMAN S. M. CO. v. AMERICAN S. M. CO

(7 Nevada, 312. Supreme Court, 1872.)

Certificate to Statement on appeal. The district judge certified the Statement as follows: "The foregoing is the settled and engrossed Statement on motion for new trial of the above entitled cause." *Held*, a substantial compliance with the statute.

Presumptions in favor of certified Statement. Allowing to the judge's certificate the presumptions in its favor, it implies that a Statement was presented, the objections thereto considered, and that it conformed or was made to conform to the truth.

Corporation not bound to line assented to by its superintendent. [1]Testimony was introduced that the original stake of plaintiff's claim was set at a certain point; that afterward another stake was set at a point which would exclude the ground in controversy, and that the officers and agents of the plaintiff's company had for several years conceded the latter stake to mark the true boundary. *Held*, that the recognition of the latter stake by the officers and agents and their acquiescence to it as the boundary was not a concession of title to the ledge beyond, and did not bind the company; and it was further *doubted* whether the admissions of the officers and agents were evidence at all to fix the boundary.

Admissions—Misleading charge. Where an instruction was given in a case of dispute between adjoining mining companies as to their boundary that "when boundaries have been established, defining and denoting the size and limits of the claim upon the surface, and for a long period have been recognized as such, the extent of the claim will be confined to the extent as manifested by such surface boundaries;" and the state of the testimony was such that the instruction applied to or was apt to be understood by the jury to refer to a fixing or recognition of

[1] "This opinion does not distinguish between admissions conceding legal conclusions which do not bind, or pass title—and admissions of fact, which may be sufficient to bind a party to a boundary line; and is extremely unsatisfactory. WHITMAN, J., filed a dissenting opinion upon the *Statement* part of the case, but said nothing about the other point involved."

boundaries after the consummation of the original location, and consisting merely in the declarations of superintendents and other officers not authorized to fix boundaries. *Held*, error.

Tenure of claim—Admissions as to extent. After a vested right to a claim has been acquired by compliance with the law, it is not held by so precarious a tenure that it can be reduced by mere declarations of superintendents or officers.

Dictum as to admissions of officers as evidence, with citation of authorities, but no decision.

Appeal from the District Court of Storey County, First Judicial District.

MITCHELL STONE, for appellant, the plaintiff below.

R. S. MESICK, for respondent.

GARBER, J.

The certificate of the statement reads: "I hereby certify that the foregoing is the settled and engrossed statement on motion for new trial of the above entitled cause. Virginia, June 24, 1871. Richard Rising, District Judge." The respondent contends that this fails to show even a substantial compliance with the statute, which requires that, when a statement is settled by the judge, it shall be accompanied with his certificate that the same has been allowed by him, and is correct.

It is much better and safer to follow the very language of the statute, but the law does not exact such a literal compliance. A substantial compliance entitles the statement to consideration, and such, we think, is here shown. Allowing proper credit to the judge for official knowledge and fidelity, and giving proper effect to the legal presumption that he did his duty, it appears, from this certificate, that a statement was proposed by the plaintiff; that it was not satisfactory to the defendant, and that consequently amendments were filed; that on due notice the judge considered the same, and passed upon the correctness and propriety of the respective claims and assertions of the parties in regard to what actually transpired at the trial allowing such amendments as made the statement conform to the proof; and that the document in question is a fair and correct copy of such statement as amended. When the judge certifies that he has

settled this statement, he in effect certifies that it is a true and correct statement. The fair and reasonable presumption is, that, in settling it, he made it conform to the truth. Construing the whole statute together, with reference to its general scope and object, it is evident that it was contemplated that where no amendments are filed, the truth of the statement proposed on motion for new trial is to be assumed. In case of dispute as to its correctness, the judge is to decide, and his decision when made is *prima facie* correct. The express requirement that the certificate shall affirm the correctness of the statement, does not preclude us from recognizing such presumptions as fairly arise from the language actually employed. This has been frequently held in the analogous case of a certificate of the acknowledgment of a deed. For instance the word "known" has been considered the equivalent of the words "personally known," on the ground that personal knowledge is implied, unless negatived from a further statement that such knowledge comes from information. The omission of the words "undue influence" has been held not to vitiate a certificate containing the other words required, and which in themselves negatived the existence of undue influence. So, where the statute required the certificate to state the acknowledgment of the party that he executed the deed freely and voluntarily, a certificate of his acknowledgment that he executed it was held sufficient, on the ground that the voluntary execution of the deed must be presumed from the fact that it was acknowledged that he executed the same: 22 Iowa, 147; 9 Mo. 522; 8 Cal. 87, 584; 13 Id. 83; 26 Miss. 574; 4 Hala. 226; 3 Dana, 114.

The only assignment of error which it is necessary to consider is based upon the following exception: "The plaintiff excepted to the portion of the charge which reads: 'E. When boundaries have been established defining and denoting the size and limits of the claim upon the surface, and for a long period of time have been recognized as such, the extent of the claim will be confined to the extent as manifested by such surface boundaries.'" The grounds stated were, that the instruction disregards the size and limits of the claim as located and recorded, and that the period of time mentioned is indefinite, and that it is not stated by whom such boundaries

should have been recognized, and that the same was calculated to mislead the jury. The respondent contends "that this portion of the charge must be read and considered in connection with the balance of it; and, that when so read, it declares the correct doctrine, and could not have misled the jury." We will consider it, then, in connection with the matter pertinent thereto disclosed in other portions of the record. The jury were instructed as follows: "The subject of controversy in this action is four hundred feet of the quartz ledge described in the complaint. The matter of title and possession of this ground is the material issue submitted to your consideration. Persons designing to appropriate a mining claim are required by the mining laws to establish the boundaries, denoting the claim on the ground by planting stakes, and the recordation of a notice of location, so that the public may be apprised of the particular claim made and its extent. Each of the parties to this suit claims the disputed ground by virtue of locations of the quartz ledge made by their predecessors. The rights of these parties are confined and limited to such ground and ledge as was *originally* located, claimed and acquired by the locations and appropriations. You must ascertain and determine from the evidence what quartz ledge or ledges were originally located and claimed, and their rights will be in accordance. The acts, declarations and works of the locators of the respective claims and all circumstances attending the locations can be taken into consideration by you in passing upon this question. If you should believe that the Overman claim was located for the ledge in controversy, as also that of the North American claim, and the locations conflict upon the ground, the superior and paramount location and possessory right will prevail, to the extent of the prior right in the party, as it existed at the time of the commencement of this suit." Afterward, in the charge, occurs the portion "E" above set forth.

The plaintiff and the defendant claim respectively portions of the Comstock lode. The northern boundary of the defendant's claim is the southern boundary of the plaintiff's claim. The dispute is as to the locality of the dividing line. The plaintiff introduced evidence tending to prove that, prior to the location of the defendant's claim, the predecessors of the

plaintiff located the Overman; that they planted a southern stake far enough south to include the ground in controversy, and recorded a notice, the description in which also included the disputed ground. The defendant introduced testimony tending to show that said south stake of the Overman was not originally planted far enough south to embrace the disputed ground; and other testimony tending to show (or which a jury, thus instructed, may have believed themselves entitled to consider as evidence) that, even if it were originally so planted, what the defendant claims as the southern boundary of the Overman had been subsequently, and prior to the commencement of this action, fixed and recognized as the true boundary line.

This testimony consisted in part of declarations made by successive superintendents and officers of the plaintiff. For example, McCullough testified that in 1869, just before he ceased to be superintendent, he supposed the south line had been fixed at a point excluding the disputed ground. The witness Hunt was asked by the defendant this question: "Did Mr. Arrington, the president of the Overman, at any time while such president, point out to you where the south stake of the Overman had been." The plaintiff objected to the question, on the ground that Arrington, as president, could not fix a boundary binding upon or affecting the Overman company; that his declarations as to boundaries were unauthorized and incompetent to establish the boundaries or affect the title of the corporation. The objection was overruled, and the witness answered that Arrington pointed out the place as being at the locality for which the defendant contended. Similar objections were overruled to questions which elicited testimony showing that long after the original location of the Overman, superintendents of the plaintiff pointed out the south boundary of its claim as being, at the times of the pointing out, where the defendant would have it. If the portion of the charge marked "E" applies to, or was apt to be understood by the jury to refer to any fixing or recognition of boundaries, occurring after the consummation of the original location and appropriation of the Overman, it was clearly so erroneous as to justify a reversal. No one would contend that after a vested right to a mining

claim has been acquired by a compliance with the laws, it is held by so precarious a tenure as that indicated, or that a corporation succeeding to such a right of property holds it as tenant at the will of its own superintendent and officers. But, in the light of the foregoing extracts from the record, the respondent contends that "the jury must have understood the court as referring to the original locators and *their* acts of defining boundaries, and consequently were not misled by this portion of the charge." In other words, the contention is that this was merely a repetition of former portions of the charge. We think the inference is the other way. The plaintiff contended that it was entitled to all the ground called for by the recorded notice, irrespective of the position of the original stakes, and without regard to the question whether any stakes were ever planted, defining the boundaries on the surface. The first portion of the charge explicitly denied this proposition, and informed the jury that the plaintiff was entitled to no more ground than was originally located and segregated by the concurrent acts of planting stakes and recording a notice. If the instruction had stopped here, the jury would have been at liberty to give to the plaintiff all the ground which, "by considering the acts, declarations and works of the *locators of* the respective claims, and all the circumstances *attending the locations*," they should ascertain to have been embraced within the original location. But the court goes further, and next tells them, in effect, that the right of the plaintiff is also limited by its extent, as it existed at the time of suit brought. That is, that the right is not to be in accordance with the original location, but in accordance with the original location as modified by subsequent fixing and recognition of boundaries. For it was not pretended, nor was evidence introduced to show, that in any other way the extent of the claim had been reduced below its original dimensions. And they are finally told, in unqualified language, that the extent of the claim must be confined within the boundaries as established and recognized no matter when, for how long, or by whom; and this, after testimony almost, if not quite as vague and indefinite as the terms of the instruction, and which might be construed as tending to show such a fixing and recognition of

boundaries long subsequent to the original location had been admitted; and against a specific objection, then and there made, that the instruction was liable to be misunderstood by the jury, as disregarding the size of the claim as located and recorded, and as giving effect to a temporary and casual recognition of such boundaries by unauthorized persons. We can not say, on this record, that the jury may not have understood this instruction to mean that although, by the original location, the plaintiff's predecessors acquired a right to the disputed ground, yet that if different boundaries (whenever or by whomsoever fixed or established) including less ground had been long recognized by successive officers of the plaintiff, such recognized boundaries must control; and, for aught we know, they may have decided the case on this theory—thus giving effect to the whole charge, as imposing two distinct limitations, neither of which could be disregarded in determining the extent of the claim; while, according to the respondent's construction of the charge, no effect whatever is given to the element of long recognition introduced by the portion under consideration. The question of the admissibility of the declarations of Arrington and others is of great practical importance, and has not been fully argued. The authorities seem to be against the admissibility of those of Arrington: *Vide*, 13 Conn. 173; 48 Penn. 177; 14 Gray, 504; 9 Rich. (Law) 473. But we do not decide the point. For the error in overruling the objections made to instruction "E," the order appealed from is reversed, and the cause remanded for a new trial.

WHITMAN, J., dissented. *Judgment reversed.*

KAMPHOUSE ET AL. v. GAFFNER.

(73 Illinois, 453. Supreme Court, 1874.)

Fixed objects control. Where boundaries are given with reference to fixed and known objects, they control courses and distances.

Evidence. Where premises occupied by certain persons are referred to in a lease as a boundary of the premises leased, it is proper to admit evidence showing the location of premises so referred to, for the purpose of

explaining the circumstances under which the lease was made, or of applying it to its proper subject-matter, or of raising and explaining a latent ambiguity.

Construction—Duty of court and not of jury. An instruction which tells the jury that in locating lands described in a lease, they should consider all the words used in the lease, having reference to the description or location of the land, and that words denoting merely bearings or directions must yield to words referring to fixed objects or monuments, is objectionable, in not construing the lease and informing the jury the precise words of description which control, instead of allowing them to determine the fact for themselves.

License to work mines can only be granted by deed. Every license that authorizes such acts as are not only required to be performed upon the land, but which gives some usufruct of the land itself, is properly a grant of an incorporeal hereditament, and must be created and transferred by deed.

License by parol good until revoked—Not transferable. A parol license to mine on land is a protection against an action of trespass for acts done under it before revocation, but it is revocable at the will of the licensor, and can not be transferred to another. A subsequent conveyance or leasing of the premises amounts to a revocation of license, whether by deed or parol, unless such license is coupled with an interest, and executed.

Former decision limited or overruled. The case of *Russell* v. *Hubbard*, 59 Ill. 335, must either be limited to cases of party walls, or be considered overruled.

Appeal from the Circuit Court of Winnebago County.

Mr. DAVID SHEEAN and Mr. WILLIAM LATHROP, for the appellants.

Mr. J. M. BAILEY, Mr. J. I. NEFF, Mr. J. W. LAKE, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the court.

This was an action of trespass *quare clausum*, by appellants against appellee and John Gaffner, Jr., who died pending the litigation in the court below. The suit was commenced in the Jo Daviess Circuit Court, whence it was removed by change of venue, on the petition of the appellee, to the Winnebago Circuit Court. Trial was had in that court, resulting in a judgment in favor of appellee, from which this appeal is prosecuted.

Appellants' claim is, that appellee and his co-defendant en-

tered certain premises to which they were entitled to possession, and mined therein and carried away large quantities of lead ore. The premises are in what is now known as the "Sand Prairie" or New California diggings, situated near the Mississippi river, in the township of Rice, in Jo Daviess county. The mining territory at this place consists of a series of bluffs, the general course of which is from north to south, rising abruptly to a considerable height, from the margin of a slough that puts back from the river. The usual mode of mining there is by running levels or drifts, horizontally, from the slough into the bluffs. The ore is found in crevices or openings in the rocks, running back from the base of the bluffs.

There is no dispute in regard to the fee simple title to the premises involved in the controversy. It was in one John Kamphouse, who died intestate in 1854, leaving him surviving, a widow and two children, who were his only heirs at law. The widow subsequently married one Lenfers, and is still living. One of the children, a daughter, intermarried with one Henke. The other child, when about eighteen months old died, leaving its mother, Mrs. Lenfers, and its sister, Mrs. Henke, its only heirs at law. Before 1870, Mrs. Henke and her husband both died intestate, leaving their infant daughter, Anna Caroline Henke, their sole surviving heir.

Appellants claim under two leases, by virtue of which they insist they are entitled to the possession, for mining purposes, of all the territory of the width of the frontage on the bluff embraced by their lessees, extending thence due east across the Kamphouse lands. Appellee claims in part under a lease, and in part under a parol license to mine. He denies that appellants are entitled to run due east from their frontage on the bluff, but insists they are only entitled to follow any crevice or mining range, starting from their frontage on the bluff, across the Kamphouse land. He also insists that he is entitled to follow any crevice or mining range, starting from his own frontage on the bluff, although it shall cross a due east and west line extending from that part of appellants' frontage on the bluff nearest his possession, across the Kamphouse land.

There was evidence tending to show that appellee, in following what he claims to be a crevice or mineral range, starting from a point on the bluff entirely beyond the frontage embraced in either of the leases under which appellants claim, crossed and went beyond a due east and west line extending from appellants' frontage, nearest his possession, across the Kamphouse land, and there took out a large amount of ore.

The first question in determining whether there was error in giving and refusing instructions, in the respects indicated by appellants' objections, is, what is the proper construction of the words descriptive of the premises leased, as found in the leases under which appellants claim?

The first lease is dated August 12, 1871, and it purports to lease "all the interest of said party of the first part (which is one half), in all that part of the lands of the estate of the late John Kamphouse, deceased, in the township of Rice, between John Gaffner's sand level, and the range he is working now. Said claim is seventy-five feet wide, and is known as the old Bardwell and Robinson range. The ground hereby leased fronts on the slough on the west half of the northeast quarter of section 28, township 27 north, of range 1, east of the fourth principal meridian, and shall run from thence east on all the lands of said Kamphouse estate."

The second lease is dated February 17, 1872, and it purports to lease "all the interest of said party of the first part (which is one half), in all that part of the lands of the estate of the late John Kamphouse, deceased, in the township of Rice, north of the leased mining claim, to Kamphouse and Roddweig, as per lease dated August 12, 1871, (known as the old Bardwell and Robinson range), and adjoining John Gaffner's mining claim. Said claim has been vacant for mining heretofore, and is a strip six feet ten inches, according to an old survey, laying between said Kamphouse and Roddweig claim, and the claim of John Gaffner. The ground hereby leased fronts on the slough on the west half of the northeast quarter of section 28, township 27 north, of range 1, east of the fourth principal meridian, and shall run from thence east on all the lands of the Kamphouse estate."

It is argued by the appellants that the word "east" as it occurs in the language quoted from the leases, was an absolute

term of description, and that the leases gave no other terms of description by which the boundaries of the premises could be discovered.

We are unable to yield our assent to this construction. *Brandt* v. *Ogden*, 1 Johns. 158, referred to as sustaining it, has, in our opinion, no application. There, the term northerly, which was held to mean due north, was alone used, without any object to direct its inclination to the east or to the west while here, the boundaries are given with reference to previous leases, and it is, therefore, impossible it could have been intended any other territory was to be included than that within those boundaries. The rule is universal where boundaries are given with reference to fixed and known objects, they control courses and distances: 4 Kent's Com. (8th Ed.) 519; 2 Washb. on Real Estate, 2d Ed. 673.

The lease to appellee bears date on the 10th day of June, 1871, and it embraces "all the interest of said party of the first part, being the undivided half in the Sand Level range, north of Burrichter & Harris' mining claim, and of two other ranges north of William Kamphouse' mining claim, on land of the estate of the late John Kamphouse, deceased, in the township of Rice. The ground hereby leased fronts on the slough, on the west half of the northeast quarter of section 28, township 27 north, of range 1, east of the fourth principal meridian, and shall run from thence east on all the lands of said Kamphouse estate."

Here, as in the leases to appellants, it is evident the words "and shall run from thence east," etc., are controlled by the previous words designating the location.

Evidence was also given showing the location and course of the range that appellee was working on the 12th day of August, 1871, and to which reference is made as a boundary by the lease to appellants of that date.

There can be no question of the competency of this and all other evidence introduced for the purpose of explaining the circumstances, under which the leases were executed: *Stanley* v. *Green*, 12 Cal. 162; *Hildebrand* v. *Fogle*, 20 Ohio, 147, 157; or of applying the leases to their proper subject-matter: *Bradley* v. *The W. A. & G. St. P. Co.* 13 Peters, 97; or of raising and explaining a latent ambiguity: Chitty on Cont.

(11 Am. Ed.) 149. See also, 1 Greenleaf's Evidence, §§ 295–8 and notes; 2 Washb. on Real Property (2d Ed.), 673.

The second instruction given at the instance of appellee, was as follows: "The jury, in ascertaining and locating the lands described in the two leases from Caroline Lenfers to plaintiffs, should consider all the words used in said leases having reference to the description or location of said lands; and words denoting merely bearings or directions must in all cases yield to words referring to fixed monuments or objects upon or in the land itself, when conflicting therewith."

This is objectionable in not construing the leases and informing the jury of the precise words of description which control, instead of allowing them to determine the fact for themselves. "It is," says Parsons, in his work on Contracts, Vol. 2, p. 492 (6th ed.), "the court * * that determines the construction of a contract. They do not state the rules and principles of law by which the jury are to be bound in construing the language which the parties have used, and then direct the jury to apply them, at their discretion, to the question of construction; nor do they refer to these rules unless they think proper to do so for the purpose of illustrating and explaining their own decision. But they give to the jury, as matter of law, what the legal construction of the contract is, and this the jury are bound absolutely to take."

The objection taken to appellee's third instruction is that it ignores, as an element of right, the possession of appellants. This is untenable. There is no evidence that appellants were in the actual possession of the *locus in quo* when the alleged trespasses were committed. The rule applicable in such cases is thus stated in 1 Chitty's Pleadings, 193: "With respect to the plaintiff's interest in the property affected, he must at the time the injury was committed, have had an actual or a constructive possession, and also a general or qualified *property* therein." Not having the actual possession, it was not pretended appellants had the constructive possession, and any general or qualified property therein otherwise than by virtue of their leases. We can not, therefore, think it probable that the use of the word "title," which, according to Blackstone, "is the means whereby the owner of lands hath just possession of his property" (2 Com's Sharswood's Ed. 194), could

have misled the jury in the respect claimed. They would, we think, naturally and properly understand it as referring to the interests claimed by virtue of the leases, nor do we think that the suggestion that the instruction leaves the jury to dispose of the rights of the parties without restriction, well founded. They are simply left to ascertain from the evidence, whether the range or crevice out of which the mineral was taken, was within the territory covered by the leases to appellants, which was proper. This was a question of fact which an inspection of the leases, alone, would not determine, but which depended as well, upon other evidence, giving the location of the premises described in the leases, with reference to the place whence the mineral in controversy was taken.

The eighth, ninth and tenth of appellee's instructions are faulty in the same respect as his second. The court, instead of construing the cases, leaves the jury to do so under its instructions. The seventh instruction is faulty in assuming that the words "crevice" and "range" are synonymous. This was a question of fact, to be determined by the jury from the evidence.

The objection on account of the refusal of the court to give, as asked, the third and fourth of appellant's instructions, can not be sustained. In them the court is asked to instruct the jury that the word "east," in the leases, means "due east" and controls the other words of description. This, under the views we have before expressed, is not allowable, and the instructions were properly refused. The fourth instruction, given at the instance of appellee, was as follows:

"If the jury believe from the evidence that before the plaintiffs acquired any rights in their mining claim in question, the defendant obtained from the owner of the land out of which the mineral in question was taken, a license to mine thereon for lead, and in mining to follow his range across the Kamphouse lands, and entered upon said lands under said license, and discovered the crevice or range out of which said mineral was taken, and opened said crevice or range, and run a level or drift along the same to the vicinity of where said mineral was taken out, expending in so doing a large sum of money, the defendant, provided it was his range, thereby acquired a right as against both the owners of said lands and

their lessees, to continue said level or drift along said crevice or range, and to take therefrom the mineral in question; and even if the jury believe from the evidence that the plaintiffs afterward obtained from the owners of said land a mining lease covering said crevice or range, said lease could not revoke or annul the defendant's right to said crevice or range, or give the plaintiffs any rights thereon as against the defendant."

The license here claimed had its origin some years before either of the leases were executed, and is not merely to perform some act upon the land, but to take a portion of that which, in legal contemplation, is the land itself. The law, as laid down in Bainbridge on Mines, at page 251, and supported by numerous English decisions, referred to in the notes, is, "that a beneficial privilege in land, as, a license to work mines, can only be granted by deed." The same author adds, on page 252: "Every license, therefore, that authorizes such acts as not only require to be performed *upon* the land, but which gives some *usufruct of the land itself*, is properly a grant of an incorporeal inhereditament, and must be created and transferred by deed." See also, Ib., at p. 129, and Collier on Mines (46 Law Library, 17). There is no controversy that such a license is a protection against an action of trespass for acts done under it before revocation; nor is it, on the other hand, controverted that such a license is revocable at the will of the licensor, nor that a subsequent conveyance, or leasing of the premises, works a revocation of the license, when the licensee has not expended money or bestowed labor on the subject of the license; but it is claimed, when this has been done, the license is irrevocable, or, at least, that it can not be revoked until the licensee shall have been compensated for his money or labor.

It is said in Bainbridge on Mines, p. 252-3: "A parol license limited in scope as above stated," that is, so that amounts only to authorize such an act as excuses a trespass and which regards rather the act itself than its connection with the land—"when fully executed and not depending on continuous acts can not be countermanded. But as long as it remains executory it may be revoked, and it can not be transferred to another. For such a license is only personal, and lasts only so long as the land belongs to the grantor or so long as

he permits its exercise. Any expenditure incurred or valuable consideration given by the grantee, will not avail to make the license less revocable." And this is quoted from the opinion of Mr. Baron ALDERSON in *Wood* v. *Leadbitter*, 13 Meeson & Welsby, 538. In *Desloge et al.* v. *Pearce et al.*, 38 Missouri, 588, the precise question under consideration arose and was fully discussed. The court, among other things, said: "A mere license unaccompanied with any vested interest in the real estate created by deed or other writing, and independent of any title acquired by grant, prescription or adverse possession and claim, for the period of the statute of limitations, must be deemed to be in its own nature, countermandable and essentially revocable at the will of the owner of the fee. It can give no irrevocable right to hold possession of the realty and to continue working the mines indefinitely and against the will of the owner of the lands." In *Woodward* v. *Seeley*, 11 Ill. 157, this court, after elaborate argument by able counsel, held a license coupled with an interest in land must be in writing, and that a mere license, whether by deed or parol, is always revocable at the will of the licensor, unless coupled with an interest and executed, then it is irrevocable.

The following, among other cases, will be found to sustain the same rule: *Cook* v. *Stearns*, 11 Mass. 535; *Morse* v. *Copeland*, 2 Gray, 302; *Hetfield* v. *The Central R. R. Co.* 5 Dutcher, 571; *Eggleston* v. *The New York R. R. Co.* 35 Barb. 162; *Houston* v. *Saffer*, 46 New Hampshire, 505; *Foster* v. *Browning*, 4 Rhode Island, 47.

Russell v. *Hubbard*, 59 Ill. 335, is referred to as announcing a different rule. That case must either be limited to cases of party walls or be considered as overruled. On mature consideration we are unwilling to announce a doctrine, that notwithstanding the prohibition of our statute of frauds to the contrary, an interest in land, which can not be terminated by revocation, may be acquired by parol license which a court of law will recognize and protect. We still preserve the distinction between law and equity, however, and to what extent a court of equity might enforce *specific performance*, or grant relief on account of the peculiar hardship resulting from a revocation by a licensor, is another question, and one that we can not now properly consider.

The cases referred to as having been decided by the Supreme Court of Iowa, in some respects, are commendable for the equitable view they take of the question; but when applied to a court in which the distinctions between law and equity are preserved, they are contrary to the current of authority, and we do not feel at liberty to follow the rule they indicate.

We are therefore of opinion the court erred in giving the instruction, and the judgment must be reversed and the cause remanded.

Judgment reversed.

LAMPE v. KENNEDY ET AL.

(45 Wisconsin, 23. Supreme Court, 1878.)

Boundaries controlled by plat. 1. Persons having mining claims on a certain quarter section of land before the same was open to entry, determined by arbitration the boundaries of their respective lots and had a plat made to show the boundaries thus determined. The quarter section was then surveyed, and one G. appointed for that purpose by the claimants, entered it for their benefit, and was instructed by them to deed, according to the plat, to the persons named thereon; and he testifies that in making his deeds he was solely guided by the plat, although it is not referred to in the deeds. The stakes put up to mark the boundaries of the lots as described in the deeds and designated on the plat, can not be found; but the boundaries on the plat can be readily ascertained by aid of the government surveys. The plat was never recorded. In a contest as to boundaries between parties claiming under deeds from G. of lots in such quarter section. *Held*, that the plat should have controlling weight in construing deeds.

Fence called for, not necessarily a line fence. 2. The deed under which defendant's claim requires the south line of their lot (the line here in dispute) to be so run as to leave standing a certain fence on plaintiff's lot. *Held*, that this does not purport to make such fence the south boundary of defendant's land; and that G. had no authority to change, by his deed, the boundaries fixed by the plat.

Appeal from the Circuit Court for Iowa County.

Ejectment, commenced in 1875, for a strip of land about three rods in width, north and south, and twenty-four rods in length, east and west, a part of the southeast quarter of a certain section 28. The strip is further described in the com-

plaint as commencing at the southwest corner of Tormey & Co.'s lot; thence south 3 rods, thence south 81 degrees east, about 24 rods; thence north 3 rods, and thence westerly along the (south) line of Tormey & Co.'s lot, to the place of beginning; and it is alleged that the southwest corner of Tormey & Co.'s lot is 8 chains and 47 links north from the southwest corner of said southeast quarter section.

The answer contained a general denial, and set up both the ten-year and the twenty-year statute of limitations.

On the trial, plaintiff introduced in evidence an unrecorded plat of the quarter section, made by Maj. C. F. Legate, in June, 1847. The origin of this plat is thus stated by Mr. Justice COLE: "The persons who had mining claims on this quarter section before the land was open to entry, chose arbitrators to settle and determine the actual boundaries of their lots, where they could not agree among themselves. This plat was made to show the boundaries of their respective lots as thus fixed by agreement or by the arbitrators. The quarter section was then surveyed by Maj. Legate (with another) and he prepared the plat to show the extent and boundaries of each lot. Goodsell, a disinterested party, was chosen or appointed by the claimants to enter the land for their benefit, and he did so. He testifies that he was instructed by these claimants 'to deed to the persons mentioned on the plat, and according to the plat.'" Goodsell further testified that he was "guided solely by the plat in making the deeds."

The lot now owned by the plaintiff is the southwest corner lot of the quarter section, called on the plat the "Rowell" lot. Adjoining this on the north is the "Tormey & Co." lot, owned by defendants. Next adjoining this northward is what is designated on the plat as the "Rodolf" lot. The deed of this from Goodsell to Rodolf is dated June 10, 1847. It describes the lot as commencing 16 chains and 70 links south of the northwest corner of the quarter section; gives the course and distances of all the sides, and specifies the length of the western side, on the west line of the quarter section, as 7 chains and 39 links. The deed from Goodsell to Bannan, Tormey and others of the Tormey & Co. lot, is dated July 26, 1847. It describes the boundaries as "commencing at a stake at the northwest corner of Rowell's lot; thence south 81 deg. east, 7

chains and 59 links, so as to leave Rowell's fence standing on Rowell's lot; thence north 7 deg. east, 8 chains and 12 links; thence north 86 deg. west, 8 chains and 52 links; thence south 7 chains and 60 links, to the place of beginning." The stake here referred to is not now found. The deed from Goodsell to the Rowell lot was dated April 8, 1850, and ran to one Barnard. It describes the boundaries as commencing at the southwest corner of said quarter section; "thence east 2 chains, 34 links; thence north 3 chains, 76½ links; thence east 3 chains, 58 links, more or less, to an established corner; thence north to a line of Tormey & Co.'s lot; thence westerly along said line to the southwest corner of Tormey & Co.'s lot; thence south to the place of beginning, containing three acres." Plaintiff claims under a deed from Barnard, dated June 4, 1853, conveying the same land.

All the deeds above mentioned were put in evidence without objection.

The Legate plat represents the northwest corner of the Rodolf lot as 16 chains, 70 links south of the northwest corner of the quarter section as there indicated; the west boundary of said lot as 7 chains, 39 links; the west boundary of the Tormey & Co. lot as 7 chains, 60 links; that of the Rowell lot as 8 chains, 47 links; and the total west line of the quarter as 40 chains, 16 links, that being the sum of the several distances above stated. The bearings and distances of the boundaries of the first two lots, on said plat, are identical with those in the deeds thereof as above described. The distances as well as courses of all sides of the Rowell lot are given on the plat, while the deed of that lot, it will be observed, fails, with a slight exception, to state distances north and south; and the second easting from the southwest corner is specified upon the plat as 2 chains, 22 links, instead of 3 chains, 58 links, as in the deed. Mr. Goodsell testified that he could not explain the latter variance.

It will thus be seen that according to the plat in evidence, the boundary line between the two lots here in question commenced at a point in the western boundary of the quarter section, 31 chains, 69 links, south of the northwest corner of the quarter, and 8 chains, 47 links, north of its southwest corner.

When the Goodsell deeds were made, there was a fence on the Rowell lot running in an easterly and westerly direction, which the defendants claim to have been the fence referred to in the description above quoted from the Goodsell deed of the Tormey & Co. lot, and to have been the true south boundary of that lot. A fence had been maintained on or near the original line of this fence until the present time. Plaintiff testifies that in reconstructing the fence he had moved the eastern end three or four feet southward. Defendants' evidence tended to show that the present fence is on the same line as the old one. It appeared that at the commencement of the action, defendants were in possession southward to this fence. It also appeared that plaintiff had a survey made to determine his northern boundary two or three years before this action; and he testifies that before that survey he did not know where his lines ran, and never claimed north of the fence above described.

The remainder of the evidence on either side need not be stated. It is sufficient to say that, giving conclusive weight to the Legate plat, the jury *might* have found that the true boundary between plaintiff's and defendants' lots was at some distance north of plaintiff's fence, and that defendants had never acquired title by adverse possession.

The court directed the jury to find for the defendants; and from a judgment in pursuance of such a verdict, the plaintiff appealed.

WM. E. CARTER, for the appellant, contended, among other things, that the plat was practically the deed of partition of the quarter section among the claimants; that all deeds made by the plat must be construed by it, so long as the plat itself remains unreformed; that Goodsell could not, by an act of his, accidental or willful, change the boundaries of any lot, nor is it of any consequence what he supposed those boundaries to be; that as the plat was Goodsell's only guide in deeding, so it must be the only guide of the court in construing the deeds, until it is set aside in whole or in some part, upon clear proof that it does not correspond with the actual boundaries established by agreement or arbitration; that plats are ordinarily material parts of the description of lands contained in them: *Shufeldt* v. *Spaulding*, 37 Wis. 662; *Fleischfresser*

v. *Schmidt*, 41 Id. 223; *Simmons* v. *Johnson*, 14 Id. 523; *Vilas* v. *Reynolds*, 6 Id. 214; *Powers* v. *Jackson*, 50 Cal. 429; *Hudson* v. *Irwin*, Id. 450; *Baxter* v. *Arnold*, 114 Mass. 577; that there is more reason in this case than in most cases for giving to the plat conclusive weight, because Goodsell did not claim to own any of the land, and must be presumed to have conveyed it all, and to have conveyed it according to the directions of his employers, which directions are found only in the plat; that this conclusion is true notwithstanding the fact that the deeds do not in terms refer to the plat; that there may be an implied as well as an expressed reference to a plat or some other prior and collateral instrument: *Shufeldt* v. *Spaulding* and *Powers* v. *Jackson*, *supra*; *Salaman* v. *Glover*, L. R. 20, Eq. Cas. 444; S. C. 15 Eng. 436; *Erskine* v. *Adeane*, L. R. 8 Ch. 756; *Morgan* v. *Griffith*, L. R. 6 Exch. 70; and that, under the evidence, the deeds in this case must be held to contain such an implied reference. He further contended that acquiescence in, or even an agreement in reference to a supposed boundary, under a mistake of facts, does not preclude either party from claiming according to the facts when the mistake is discovered: *Warner* v. *Fountain*, 28 Wis. 405: *Knowlton* v. *Smith*, 36 Mo. 507; *Kincaid* v. *Dormey*, 51 Id. 552.

For the respondents a brief was filed by LANYON & SPENSLEY and M. J. BRIGGS, and the cause was argued orally by Mr. SPENSLEY and J. T. MILLS. After a full discussion of the evidence, they argued substantially as follows: 1. The Legate plat is of no importance in the case. It was not recorded, defendants knew nothing of it; and if Goodsell was governed by a plat in making the deeds, it is appearant that this is not the one, and even if it was, defendants are not bound by it. They take under their deed, which gives the metes and bounds, and was duly recorded long before the plaintiff or his grantors had any claim. 2. To locate the Rowell lot according either to the deed or the plat, the first survey from which they were made, must be reproduced. If this were done by commencing at the same corner with a chain of the same length, etc., it would doubtless result in locating the fence as the dividing line between the lots. 3. Goodsell's deed of the Tormey & Co. lot clearly established

its south line along the line of Rowell's fence. This deed was not made with reference to government lines, corners or subdivisions, but with reference to this artificial monument, which must govern as to this boundary: *Coats* v. *Taft*, 12 Wis. 388; *Gove* v. *White*, 20 Id. 432, and cases cited in opinion of DIXON C. J.; *Marsh* v. *Mitchell*, 25 Id. 706; *Du Pont* v. *Davis*, 30 Id. 171; *McEvoy* v. *Loyd*, 31 Id. 142; *Fleischfresser* v. *Schmidt*, 41 Id. 223; *Frost* v. *Spaulding*, 19 Pick. 445; 3 Washb. R. P., ch. 5, sec. 4, pp. 40–46. 4. The acquiescence for so many years in the Rowell fence as the boundary line between the lots is sufficient of itself to establish that boundary: 2 Hilliard R. P. 349; 3 Washb. R. P. ch. 2, sec. 6, pp. 9; *Rockwell* v. *Adams*, 6 Wend. 467; *Rockwell* v. *Adams*, 7 Cow. 761.

COLE, J. We think the learned circuit court erred in directing the jury to find for the defendants upon the evidence introduced on the trial. The plat of the quarter section made by Major Legate in June, 1847, was in evidence and should have controlling weight in the construction of all deeds made by Goodsell under it. It appears that this plat, by common consent, was made the common muniment of title by all persons interested in the land, and was intended as a guide to Goodsell in making his deeds. Under these circumstances the plat would seem to be the best evidence upon all questions of disputed boundary. Proper weight being given to the plat, it is plain that the evidence tended to show that the plaintiff was entitled to recover a definite portion of the land which could easily be identified from such plat, and the deeds introduced on the trial. It is true the plat is not referred to in the deeds, but we see no reason why this fact should prevent it from being resorted to in order to ascertain the boundary of any lot in dispute. It appears that the stakes put up to mark the boundaries of the lots as described in the deeds and designated on the plat, could not be found. There were, therefore, no artificial monuments which fixed the boundaries, as claimed by defendants' counsel. But the boundaries on the plat could be readily ascertained from the government surveys.

It is said by the defendants' counsel that the deed from Goodsell to Bannan and others requires the south line of their lot to be so run as "to leave Rowell's fence on Rowell's lot,"

and that consequently the fence was an established boundary for the plaintiff's lot on the north. But it will be noticed that the language in the deed does not make the fence a boundary, but merely says that the south line of defendants' lot must be so run as to leave the fence on the plaintiff's land. However, when the deed is interpreted by the plat, as it should be, the true boundary between the plaintiff's and defendants' land will be ascertained. Besides, Goodsell had no authority to change the boundaries as fixed by the plat.

It is said that the defendants knew nothing of this plat, and that even if Goodsell was governed by it in making his conveyances to the several lot owners, the defendants ought not to be affected by it. We fail to see any good reason for holding that the defendants should not be affected by the plat. The defendant McGuire was one of the original claimants by whose direction this plat was made; the defendant Tormey took his interest on the death of his brother Nicholas, in 1850, who was another of the original claimants; and the other defendants are lessees under these parties. Under these circumstances, the plat, as it seems to us, was a proper document to be resorted to, to determine the true boundary line. True, the deed from Goodsell to Bannan and others was prior in date to the deed to Barnard, under which the plaintiff claims. But that circumstance is immaterial, inasmuch as the plat was the foundation or common muniment of title for all the claimants, and Goodsell says he was solely guided by it in making his deeds. The plat, therefore, was entitled to controlling weight in determining all questions of disputed boundary.

It follows from these views that the judgment of the circuit court must be reversed, and a new trial ordered.

So ordered by the court.

1. Boundaries of claim must be defined: *Attwood* v. *Fricot*, 17 Cal. 38; *Post* CLAIM; *Hess* v. *Winder*, 30 Cal. 349; *Post* POSSESSION; *Gleeson* v. *Martin Co.*, 13 Nev. 442; *Post* LOCATION.

2. Possession extends to boundaries of claim: *English* v. *Johnson*, 17 Cal. 108; *Post* POSSESSION.

3. Boundary is a question of fact for the jury: *Lyle* v. *Richards*, L. R. 1 H. L. 222.

4. Stakes are sufficient boundaries: *Boardman* v. *Thompson*, 3 Mont. 387; *Post* FORCIBLE ENTRY.

5. Attempted correction of title papers by plat, in the new Almaden Quicksilver Mine case: *The Fossat case*, 2 Wall. 649.

6. A stockholder's admissions cannot bind his company as to boundaries: *Western Co.* v. *Peytona Co.*, 8 W. Va. 406.

7. Every person must keep to his own boundary: the mere acquiescence of the party whose boundaries have been crossed, he being ignorant of the real boundary, does not estop him from asserting the trespass when ascertained: *Id.*

EAST ET AL. v. EALER.

(24 Lou. Ann. 129. Supreme Court, 1872.)

Brick kiln, not included in deed.—Movables, such as bricks in a kiln, do not pass in a deed of conveyance unless specially mentioned. The purchaser of a plantation who used brick from a kiln which he knew had previously been sold to another person, by his vendor, is liable to the owner for their value.

Appeal from the Fifth Judicial District Court, parish of East Feliciana. POSEY, J.

KILBOURNE & MCVEA, for plaintiff and appellee.

KERNAN & LYONS, for defendant and appellant.

This case was tried by a jury in the court below.

HOWELL, J.—On the fifteenth of September, 1866, the plaintiff purchased of Mrs. Nolan a brick kiln, containing about one hundred thousand bricks, on the plantation of the owner, in the parish of East Feliciana, with the right to remove them at pleasure; the delivery being acknowledged by the purchaser. In the following year the plantation with appurtenances was sold to F. Powers, who recognized plaintiff's ownership of the bricks, and hired her his wagons to remove a part of them. The plantation was reconveyed to Mrs. Nolan, who early in 1868 sold it with the appurtenances to H. C. Ealer, residing in St. Louis, Missouri. His agent and manager, H. A. Ealer, the defendant, moved upon the plantation and conducted the planting operations. During the year plaintiff sent teams to haul away the balance of the bricks, but was prevented by the defendant from doing so, whereupon this suit was brought for the value thereof. The defendant pleaded the general denial and alleged that at the date of filing the petition, H. C. Ealer, who was the purchaser of the plantation and bricks, was dead. It appears, however, that before he filed his answer he had taken a title to the said plantation from the widow of the deceased, H. C. Ealer, and he filed no exception to the suit against himself. The act of sale from Nolan to Powers is similar, in the description of the property,

to the one from Nolan to Ealer, and neither one makes any mention of the bricks, which, being movables, were therefore not conveyed by the said act. And there is evidence that defendant was aware that plaintiff had purchased them from Mrs. Nolan before she sold the land. Under these circumstances the plaintiff is entitled to the value of the bricks which have been converted by defendant to his own purposes.

A jury found for plaintiff.

Judgment affirmed.

1. Contract to make brick on land of another not within the statute of frauds: *Brown* v. *Morris*, 83 N. C., 251; *Post* CONTRACT.
2. Delivery of 41,228 brick is substantial compliance with contract to deliver 41,000: *Id.*
3. Instance of brick kiln enjoined as a nuisance: *Walter* v. *Selfe*, 4 DeGe & S. 315.
4. Injunction to restrain brick making granted in favor of the reversioner as a case of destructive waste: *London* v. *Web*, 1 P. Williams, 527; *Post* INJUNCTION.

DAY ET AL V. HOLMES.
SAME V. SAME AND TRUSTEE.
HOLMES V. DAY ET AL.

(103 Massachusetts, 306. Supreme Court, 1869.)

Misrepresentation—Ratification—Usage.—H. gave D. an order to buy 500 shares of P. mining stock, deliverable at any time at buyer's option, in sixty days and three days grace, with interest at a price not exceeding $2 per share. D. bought the stock on thirty days at $1,62½ per share. H. and D. afterward exchanged, bought and sold contracts in which the P. stock was stated as bought at $1.75 per share, and D. afterward made a written statement of account with H., in which he was charged with the P. stock at $1.75 per share, with interest and brokerage. H. gave his note in settlement of this account, in ignorance that his order had not been duly executed. Upon suit brought on the note, it was *held* that the acts of D. were equivalent to a misrepresentation of material facts, and induced H. to give his note under the deception; *held, also*, that the exchange of bought and sold contracts did not ratify the purchase by D., because H. was ignorant that his order had not been duly executed; *held, also*, that a usage among brokers to buy on shorter time than ordered and carry the same until the maturity of the contract and to charge brokerage for so doing, can not be supported.

Conversion of mining stocks.—H. delivered to D., as collateral security, certain mining stocks assigned in blank, which D. filled up in his own name and thereupon had new certificates issued to him. D. afterward transferred part of this stock, but took back blank assignments for the same, and the balance he transferred to E. as trustee. It also appeared that the stock remained under the control of D. and ready to be delivered to H. upon payment of his notes. *Held*, that the rights of H. had not been violated, and that the acts of D. did not amount to a conversion.

The first two actions were on promissory notes made by defendant and the last was for the alleged conversion of mining stocks by the plaintiffs in the first two actions.

The cases were referred to George W. Phillips, Esq., as auditor, who found as follows: "There was a general well-known usage, among stock-brokers in Boston, in filling orders for stock, to buy the stock for cash, or on a shorter time than ordered, in their own names, not disclosing the names of their principals, and to turn the same, as it is called, or carry it till the maturity of the contract, and to charge therefor a brokerage in addition to the usual commissions for buying

as compensation for the risk of such carrying; that the amount of such extra brokerage differed with different stocks and with the length of time for which they were carried, being greater in the case of some stocks and smaller in that of others and greater for a long time and less for a short one; that such usage was well known among persons dealing in stocks of the description in question. There was no evidence of actual knowledge by the defendant of such usage."

The cases were submitted to the judgment of the Superior Court upon the finding of the auditor, as an agreed statement of facts and the court ordered judgment for the plaintiffs in the first two actions, but in computing the amount thereof excluded two notes given by defendant in settlement of purchases of stock in the Pontiac and Hancock Mining Companies; and in the third case, for the defendants, and both parties appealed. The other facts are stated in the opinion:

T. WESTON, Jr., for Day and others.

J. D. BRYANT and F. GOODWIN, for Holmes.

MORTON, J.

The able report of the auditor and his clear marshalling of the complicated facts of these cases, have greatly aided the court in determining the principles of law which underlie the rights of the parties.

The first controverted question which arises is, as to the validity of two notes given by the defendant in settlement of the purchase of the Pontiac and the Hancock stocks. The transactions in regard to each of these notes are substantially the same. It is therefore necessary to consider in detail only one of them. The facts as to the Pontiac stock are as follows: On August 30, 1866, the defendant gave to the plaintiffs, (who were stock-brokers,) an order which it is admitted meant, when filled out in words: "Buy for D. W. Holmes 500 shares of Pontiac mining stock, deliverable at any time at buyer's option in sixty days and three days grace with interest at a price not exceeding $2 per share, the order to stand open for two weeks." On or about September 6, 1866, the plaintiffs exchanged with the defendant bought and sold con-

tracts, in which the said 500 shares of Pontiac stock were stated as bought at $1.75 per share, deliverable in sixty days at buyer's option, and the words, "and brokerage" added at the foot. At the expiration of said sixty days and grace, namely, on November 8, 1866, the plaintiffs made to the defendant the written statement, of which the following is a copy:

"BOSTON, November 8, 1866.

R. L. DAY & Co.

Bought for D. W. HOLMES,

500 Pontiac Mining Co., 1¼, ...	$875 00
1-16 Brokerage, ...	31 25
	$906 25
63 days interest and stamp	10 36
	$916 61"

Thereupon the bought and sold contracts were mutually surrendered, and the defendant gave the plaintiffs the note in question for $916.61. The plaintiffs were unable, at the time when the said order was given, to buy the stock in question on sixty days; they could have bought it for $1.50 cash per share; but they did in fact buy it, through other brokers, on thirty days, at $1.62½ per share, and not at $1.75 as charged in said written statement. At the end of said thirty days and grace, the plaintiffs paid for said stock at $1.62½ per share, and interest and commissions, and a certificate was issued in their names, they holding the same as collateral to cover this contract with the defendant. The defendant had no knowledge of the manner in which the plaintiffs procured this stock or of the amounts paid therefor. Upon these facts we are of opinion that the defendant is not liable upon the note in question. The course of the plaintiffs in buying the 500 shares of stock as above stated, was not an execution of the order of the defendant, and was unauthorized by him. It was a departure from the instructions of their principal, and he was not bound to take and pay for the stock thus purchased: *Pickering* v. *Demerritt*, 100 Mass. 416. The defendant gave his note in settlement for this stock without knowledge that his order had not been duly executed. The exchange by the plaintiffs of the bought and sold contracts, and the rendering

of the account of November 8th, without notice to the defendant of the real facts, amounted to a legal fraud upon him. These acts of the plaintiffs were equivalent to a misrepresentation by them of material facts, the natural and necessary effect of which was to mislead the defendant and induce him to give his note under a deception thus practiced upon him by the plaintiffs.

The argument that by exchanging the bought and sold contracts the defendant ratified the act of purchase by the plaintiffs, is unsound, because at the time of doing so the defendant was ignorant of the fact that his order had not been duly executed.

The usage alleged by the plaintiffs to exist among stock-brokers in Boston can not avail them. There are many forcible objections to its validity; but a conclusive one is, that it is against sound policy and good morals. It authorizes the broker, in his discretion, to disregard his instructions, and, instead of acting solely in the interest of his principal, to speculate upon the transaction for his own benefit. It creates in the agent an interest adverse to his principal, and is inconsistent with his duty and the obligations which the law imposes upon him when he enters into the contract of agency. Such a usage, unknown to the principal, can not be supported.

It follows from these considerations that the plaintiffs are not entitled to recover on the two notes given for the Pontiac and Hancock stocks.

The remaining notes held by the plaintiffs are admitted to be valid. The auditor has found certain payments and credits, which it is conceded should be applied in partial extinguishment of these notes. But the defendant claims that, in addition thereto, he should be allowed the value of the stocks sold by the plaintiffs as collateral, in February and March, 1867, upon the ground that the acts of the plaintiffs in regard to them, in law, amounted to a conversion. Upon this claim two questions arise:

1. It appears from the auditor's report that the defendant lodged with the plaintiffs certificates of 200 shares of Humboldt Mining Company, and 200 shares of Petherick Mining Company, not purchased by the plaintiffs, as general collateral security for his indebtedness to them, with

assignments in blank, and on the 15th and 16th of February, 1867, the plaintiffs filled up the blank assignments by inserting their own names, and new certificates were issued to them. This was in no sense a sale of the stock to themselves. The delivery to them of the assignment in blank necessarily implied the right to insert their own names, and the doing so and taking out of new certificates was in accordance with the implied contract of the parties, and a lawful and reasonable measure to protect their security, and can upon no principle be deemed an unlawful conversion.

2. We are of opinion that the transfers of this stock, made March 4, 1867, did not in law amount to a conversion. It appears from the evidence, which was clearly admissible, that these transfers were made by the plaintiffs in good faith, for the purpose of relieving themselves from supposed damage to their credit by reason of holding so many of these stocks, that there was no contract of sale of any of them, that no money or other consideration was paid or agreed to be paid therefor, that they took back from the transferees, except in the case of the transfer to Charles E. Eddy, Jr., as trustee, blank assignments, and that all the said stocks including the Eddy stock, remained under their control and ready for delivery to the defendant on payment of his notes held by them. It was obviously not the intention of the plaintiffs to exercise any dominion over these stocks inconsistent with the rights of the defendant. His rights were not in fact violated or injuriously affected. He could at any time have received his collaterals upon payment of his debts. There having been no demand and refusal, and the defendant having sustained no injury from the acts of the plaintiffs, we are of opinion that they did not amount to a conversion: *Wood* v. *Hayes*, 15 Gray, 375.

The only other question presented is, as to the sum of $512.39 indorsed on the note given for the Pontiac stock as of December 15, 1866. The plaintiffs' claim, that this sum should not be credited to the defendant in general account, can not be sustained. The auditor finds that it is to be credited on general account, and nothing appears to impeach the correctness of his finding. It is clear that a different finding could not be sustained.

The result is, that the judgment of the Superior Court must be

Affirmed.

GIDDINGS ET AL. v. SEARS.

(103 Massachusetts, 311. Supreme Court, 1869.)

Mining stocks.—S. having ordered G., his broker, to buy certain stock for him, G. made the purchase and took the certificate in his own name, but offered to transfer the certificate to S. upon payment for the stock, but S. neglected to pay for the same, and G. afterward brought suit for the price thereof. On the trial the testimony was conflicting, whether S. had instructed G. to sell the stock at a particular time, and S. asked the judge to instruct the jury "that as plaintiffs held the stock, they could recover only the difference between the price paid for it and its market value on the day of their demand." *Held*, that the instruction was properly refused.

This was a suit to recover money paid for two hundred shares of stock in the Huron Mining Company, bought for the defendant.

At the trial in the Supreme Court, before GRAY, J., the plaintiffs testified that, on Feb. 28, 1867, the defendant, being in New York, ordered them by telegraph to buy the stock in question for him in Boston; that they did so, and telegraphed him that they had bought it "regular"; "that 'regular' was buy to-day and pay to-morrow on delivery of the stock"; "that the usage was, where brokers bought stock for another, and paid for it with their own funds, to buy the stock in their own names, have it transferred to their personal credit at the time of paying for it and hold it until reimbursed by their principal"; that they paid for the stock on March 1st, and took a certificate thereof in their own names; that the defendant subsequently acknowledged that the stock was bought for him; that "on March 11th, the plaintiffs called on the defendant, tendered him an account of the purchase, demanded payment, and offered to transfer the certificate to him, and the defendant promised to pay for the stock but asked for time"; that "the defendant never directed or suggested a sale of the stock, and

the plaintiffs never did sell it, or tell him that they had sold it; and that the stock was now worthless." No objection was made to the competency of any of this testimony.

The defendant was permitted, "against the objection of the plaintiffs, and for the purpose of showing the relation in which the parties stood at the time of the order to buy the stock, to testify, that he had for two or three years had dealings with the plaintiffs in which he had ordered them to buy stocks 'regular,' and the usual course was for them to buy and pay for the stocks, and hold them a short time, and then sell them and receive or pay the difference in price." He also testified that on March 11th, he instructed the plaintiffs to sell the stock now in question, and on the next day they told him they had sold it for the market price on that day, and demanded of him the balance, which was $2,612; and that he promised to pay that sum, if they would give him a little time.

"The defendant requested the judge to instruct the jury that, as the plaintiffs held the stock, they could recover only the difference between the price paid for it and its market value on the day of their demand. The judge declined so to rule, and instructed the jury that if the stock was bought and held by the plaintiffs for the defendant, and he did not order it to be sold, they might recover the amount paid by them for the stock with interest from the date of payment." The jury returned a verdict for the plaintiffs for the full amount claimed, and the judge reported the case for the determination of the full court; "if the ruling requested was rightly refused, judgment to be entered on the verdict; otherwise, judgment to be entered for the plaintiffs for $2,612, and interest from March 12, 1867."

G. O. SHATTUCK and C. W. HUNTINGDON, for the defendant.

N. MORSE, for the plaintiffs.

COLT, J.—There is nothing in the case which seems to require the instruction which the defendant requested. Upon the defendant's evidence, it is plain that the plaintiffs purchased for him upon his order, and held the stock only as agents for him. The rule asked for is applicable only where the plaintiff seeks to recover damages for the breach of an execu-

tory contract of sale. The jury must have found, under the instructions given, that the stock was bought and held by the plaintiffs for the defendant, and that he did not order it to be sold.

Judgment on the verdict.

DANIELS v. WILBER.

(60 Illinois, 526. Supreme Court, 1871.)

Admission of value of services.—W. rendered certain services for D. in the sale of coal lands, which occupied but a single day, and thereupon presented a bill to D., in which he charged $1,000 for his services. D. afterward brought suit to recover for the services rendered and obtained a verdict for $3,750. *Held*, that the estimate placed upon the value of his services in the bill presented by W. was an admission that $1,000 was all that his services were reasonably worth and that the court below should have set aside the verdict, because the damages were palpably excessive.

Appeal from the Circuit Court of Cook County; the Hon. JOHN G. ROGERS, Judge, presiding.

VAN ARMAN & VALETTE, for the appellant.

HARDY & HERRICK, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the court.

This was an action of assumpsit, brought by Wilber against Daniels to recover for labor and service rendered by the former to the latter in and about the negotiation of a sale of certain real estate of Daniels.

The proof of any employment at all of Wilber by Daniels was not very satisfactory—there was no contract for the amount of compensation pretended—but the claim and recovery of compensation were upon a mere *quantum meruit*.

The service rendered by Wilber, and for which he claimed compensation as sworn to by himself, consisted in making a journey from his home in Wilmington, Ill., to Chicago, and there holding an interview and conversation with a certain

person for the purpose of negotiating for the sale of certain coal lands of Daniels, all which, with Wilber's return home, occupied only the whole or some part of a single day.

Daniels subsequently effected a sale of the land to a certain coal company, of which the person with whom Wilber had the interview and conversation, was treasurer; but to what extent, if any, Wilber's services conduced to the sale was disputed and uncertain.

About six months after the conclusion of the sale by Daniels, Wilber presented to him a bill in writing for the services he claimed to have rendered in making the sale, in which bill the price charged for the entire service for which the suit was brought was the sum of $1,000.

The verdict was for $3,750, upon which judgment was rendered.

This deliberate estimate which Wilber himself, in view of all the facts in the case, placed upon the value of his services in the bill presented, was an admission of the strongest character that it was all that his services were reasonably worth—an admission so strong that under the circumstances of this case, and for aught that appears in this record to detract from its force, we think it should constitute the utmost limit of any recovery on the part of Wilber.

The court below should have set aside the verdict because the damages were palpably excessive.

The judgment is reversed and the cause remanded.

Judgment reversed.

WINANS v. HASSEY.

(48 California, 634. Supreme Court, 1874.)

Usage to pay on delivery.—A receipt is only *prima facie* evidence of the payment of money; and a contract made in the Board of Brokers in San Francisco, acknowledging the receipt of money, having been delivered before the money was paid, it is competent to prove the habitual course of dealing among members of the Board in like transactions, in order to account for the mistake.

Coin contract.—Upon a contract which called for payment in gold coin,

suit was brought and verdict returned for plaintiff, without specifying the kind of money to be recovered. *Held*, that judgment was prop rly rendered for gold coin.

Exceptions too general.—Exceptions to the admission of evidence, which do not specify the ground of objection, will not be considered.

Appeal from the District Court of the City and County of San Francisco, Fourth Judicial District.

The complaint stated that on October 26, 1871, the plaintiff sold to the defendant one hundred and fifty shares of the stock of the Eureka Consolidated Mining Company for $4,500, to be paid in United States gold coin, of which sum $900 was to be paid on the receipt of a contract, and the balance on delivery of the stock, which was to be delivered on demand within thirty days. That the plaintiff and defendant then exchanged contracts in writing in which each one expressed the terms of the agreement on his part. That the contract drawn and signed by plaintiff, acknowledged the receipt of the $900, but by mistake was delivered without any actual payment of the same. That the defendant afterward paid the other sum called for in the contract and plaintiff delivered the stock, and still later discovered his mistake and demanded the $900, but the defendant refused to pay it.

The answer admitted the contract, but denied that the $900 had not been paid.

On the trial before a jury the plaintiff offered the following contract:

Broker's Contract.

"Amount	$4,500
"Deposit	900
"Balance	$3,600

"SAN FRANCISCO, October 26, 1871.

"I have this day sold to F. A. Hassey one hundred and fifty shares Eureka Consolidated Mining Company's stock, for the sum of forty-five hundred dollars, payable in United States gold coin, and deliverable at the buyer's option within thirty days from date hereof. For the due fulfillment of this contract I have received on account, as part payment, the sum of nine hundred dollars ($900), the receipt of which is hereby

acknowledged, and upon further payment of the balance due I agree to transfer to F. A. Hassey, or to his order, the above-mentioned stock in accordance with the terms of this contract.

"N. B. All unmentioned points in this contract subject to the rules of the San Francisco Stock and Exchange Board.

"(Signed.) J. C. Winans. [SEAL.]"

He also proved that the sale was made in the Board of Brokers in San Francisco, and that both parties were members thereof.

For the purpose of explaining how the contract came to be delivered without the payment of the $900, the plaintiff was allowed to testify, subject to defendant's objection, that the custom in the board after such a sale was to make a contract and duplicate describing the transaction, one of which was to be signed by the buyer and the other by the seller, and both of them, with the stock, placed in the bank; that the bank then indorsed upon the buyer's contract the number of shares of stock that were deposited, and delivered it to him, and that he should then have paid the $900, but it was not done.

The defendant also objected to any evidence contradicting the acknowledgment of a receipt of the money contained in the contract, but the court overruled the objection. The jury returned a verdict for the plaintiff, but did not specify in what kind of money it should be paid. The court rendered judgment for the plaintiff in gold coin. The defendant appealed.

G. F. & W. H. SHARP, for the appellant.

J. W. WINANS, for the respondent.

By the Court, NILES, J.

1. The receipt written in the contract was only *prima facie* evidence of the payment of the money. It was competent for the plaintiff to prove the habitual course of dealing among members of the board of brokers in transactions like the one in question, as tending in some degree to account for the delivery of the contract to the defendant, although the first payment had not been actually made.

2. It was alleged in the complaint and admitted by the

answer, that the contract called for payment in gold coin, and judgment was properly so rendered. It is not required that the verdict in such case should specify the kind of currency or money to be recovered.

3. Several exceptions were taken to the admission of evidence, which can not be cousidered here, as no specific ground of objection was stated at the trial.

We see no substantial error in any ruling of the court.

Judgment and order affirmed.

Neither Mr. Justice CROCKETT, nor Mr. Justice RHODES expressed an opinion.

CARTER ET AL. v. PHILADELPHIA COAL CO.

(77 Pennsylvania St., 286. Supreme Court, 1875.)

Usage in coal trade—Presumption. C. & S., who sold coal for the Pa. Coal Co., in so doing employed S. & M., coal brokers, and paid them commissions, which were charged to the Pa. Coal Co. and on settlement were paid by it. Upon suit brought to recover these commissions alleged to have been improperly charged, it was *held* that C. & S. might show it to be the usual and customary method of the Philadelphia coal trade to sell through the agency of brokers, to whom a commission was paid, and that this proof was substantially the same as proof of an established, uniform and general custom; *held also*, that the usages of a particular trade are presumed to be known to those engaged therein.

Commissions. Evidence that certain large sales of coal could only have been made through the particular brokers employed, *held* to be competent upon suit to recover back commissions.

Control of company. The instruction "The defendants had a large majority of the stock, therefore the control of the company was entirely in their hands," *held* to be erroneous; the fact being that defendants had but two out of five directors.

Removal of secretary. Proof that the secretary of the company was removed because he could no longer endure the rule of C. & S. was improperly admitted, the reason not having been made known to them.

Error to the District Court of Philadelphia.

This was an action in assumpsit by the Philadelphia Coal Company against William T. Carter and Charles F. Schoener, partners as William T. Carter & Co.

Prior to 1867, G. W. Huntzinger & Co. were mining and shipping coal from Girard lands, in Schuylkill county, leased by them; and in that year the firm was incorporated as the Philadelphia Coal Co. with Harry L. Cake as president, Huntzinger as treasurer, and George C. Mitchell as secretary; the company having five directors. Before and after the incorporation, Huntzinger & Co. and the plaintiffs had had business transactions with the defendants, and on July 1, 1867, owed them $60,000.

In November, 1867, by arrangement, the defendants became directors in the corporation, with Cake, Huntzinger and D. B. Brown, three of the old directors, and Carter was chosen president. The defendants sold coal for the company to the Philadelphia & Reading Railroad Co., and charged therefor certain commissions paid to Shoemaker & McIntyre, coal brokers, through whom they made the sales, which commissions were allowed and paid by plaintiffs on settlement, but which plaintiffs now seek to recover, alleging that they were not earned by Shoemaker & McIntyre.

G. W. Huntzinger testified for plaintiffs that the "Carter party" were in the minority in the board of directors. The whole stock of the company was $350,000, of which $200,000 were held by defendants as collateral security for the debt of Huntzinger & Co., which in 1868, amounted to $100,000. In November, 1868, the plaintiffs settled finally with defendants, who accepted notes in payment and who retransferred the stock to plaintiffs as the debt was paid off. The first complaint as to the commissions was in November or December, 1868. G. W. Mitchell, the secretary, kept the accounts with the defendants in the books of the company.

On re-examination witness was asked why Mitchell was removed from the secretaryship. Defendants objected. Objection was overruled and exception taken and witness replied "Mitchell was removed on the 6th of November, 1868, because we could no longer live under this rule of William T. Carter & Co."

H. L. Cake testified that he first had knowledge of the charge of the commissions in July, 1868; he had never examined the books of the plaintiffs. On November 4, 1868, he found that Mitchell had made the entry allowing commissions to defend-

ants for sales as made by Shoemaker & McIntyre, which witness himself had made to the railroad company. Witness received orders from the company every month for coal.

The president of the railroad company testified that they had made no purchase through Shoemaker & McIntyre.

There was other evidence in support of their case.

Carter testified for defendants, that during his presidency of the company, the accounts were regularly entered, and that he gave the secretary no special instructions about entering the accounts. Huntzinger always had access to the books; all the money paid Shoemaker & McIntyre was earned by them; "commissions" was the only item objected to at the settlements; witness proposed to Cake to carry a balance of $30,000 or $40,000, for from three to fifteen months, and Cake, in consideration of that offer, withdrew all objection to the commissions and settled in full; the defendants had a controlling vote at the stockholder's meetings.

The defendants then offered to show by a miner and shipper of coal, that during the years from 1867 to 1871, inclusive, "it had been the usual and customary method of the Philadelphia coal trade to sell their coal, through the agency of brokers, to the railroad company, to whom a commission was paid; that witness sold largely to the Reading Railroad Company through Shoemaker & McIntyre, and that the sales so effected could not have been effected in any other way."

The offer was objected to; objection sustained and exception taken.

The defendant gave evidence that Huntzinger agreed to the propriety of selling the coal through Shoemaker & McIntyre, that he said it was better to pay them commission than have coal sold by them for other persons.

Henry F. Shoemaker, of the firm of Shoemaker & McIntyre, testified that his firm had an order to buy coal from the Philadelphia & Reading Railroad Company; that it was desirable to sell coal to that company. The firm agreed with Carter & Huntzinger, who represented the plaintiffs, to sell all plaintiffs' coal for 15 cents per ton. But for this arrangement plaintiffs' collieries would have been idle.

Defendants offered to show by Carter that the coal could not be sold except to the Philadelphia & Reading Railroad

Company. Plaintiffs' objected; objection sustained, and exception taken.

There was evidence tending to show that most of the coal sold by plaintiffs was to the Philadelphia & Reading Railroad Company.

The following receipt was given at the final settlement:

"Received, Phila., Nov. 20th, 1868, of Messrs. G. W. Huntzinger & Co. their two acceptances of H. L. Cake's drafts, as follows: one dated November 30th, 1868, 4 months after date, for $10,000; the other dated November 20th, 1868, for $5,809.22, also check No. 2406, on First National Bank, for $14,000, being the balance due us as per settlement made this day. W. T. CARTER & Co.

"$10,000.00
5,809.23
14,000.00

$29,809.23"

The court (MITCHELL, J.) charged:

"This is an action to recover back commissions alleged to be improperly contained in accounts between the parties.

"The plaintiffs' case is that the commissions were not earned by Shoemaker & McIntyre, sales having in fact been made by Cake, and coal taken from the car by the Reading Railroad Company; and that the charges are inserted in the defendants' account in violation of duty and good faith."

The defense is:

"1. That the commissions were earned by Shoemaker & McIntyre. That they were paid in good faith by defendants to Shoemaker & McIntyre. That the commissions were moderate. That sales could not have been otherwise made.

"2. That plaintiffs knew of the payment of these commissions, and acquiesced therein at the time.

"3. That any objections that may have been subsequently raised thereto were abandoned in November, 1868, at the final settlement.

"[The defendants held a large majority of the stock; therefore the control of the company was entirely in their hands.] They were bound to strict and peculiar fidelity.

"The defendants, Wm. T. Carter & Co., were composed of the president and one director of the plaintiffs' company, and their accounts were entered and passed by themselves. The jury, therefore, will examine closely these accounts, as the parties were under special obligations to good faith and careful dealing.

"The plaintiffs' company were, in fact, G. W. Huntzinger & Co. The evidence is that Huntzinger & Co. owned the stock and handed it over as collateral, and on payment of their debt it was returned to them. While, therefore, Carter, as president, and Schoener, as director, were bound to conduct the affairs of the company with good faith, and to show this in the clearest manner in their dealings with themselves as Wm. T. Carter & Co., yet they had a right to treat G. W. Huntzinger & Co. as the coal company; and if G. W. Huntzinger & Co. were satisfied with the management and with the things done, Carter & Co. were not bound to look for a more formal approval by the coal company as such.

"1. The first question for your consideration is, whether these sales were made by Shoemaker & McIntyre? * * *

"4. If Huntzinger & Co. knew of the payment of these commissions and acquiesced in them, they would be bound. Upon this point you have the testimony of these parties and also of Mr. Shoemaker and Mr. Mitchell, and the fact of the entries on the company's book, to which Mr. Huntzinger, at least, always had access." * * *

The verdict was for the plaintiff for $2,000.

The defendants took a writ of error. They assigned for error:

1. Allowing the plaintiffs to give evidence why Mitchell, secretary of the company, was removed.

3. Refusing to allow the defendants to prove that it was the custom of the Philadelphia coal trade to sell by the agency of brokers.

5. Refusing to allow defendants to prove that the plaintiffs' coal could not have been sold to the railroad company except through Shoemaker & McIntyre.

7. The part of the charge in brackets.

M. J. MICHESON and T. CUYLER, for plaintiffs in error.

G. M. DALLAS, for defendants in error.

Mr. Justice MERCUR delivered the opinion of the court.

This was a suit to recover back certain commissions, claimed by, and allowed to, the plaintiffs in error on a previous settlement between the parties. It was a settlement of the business enterprise generally, in which the parties were jointly interested; and also of the particular transaction on which the plaintiff in error claimed to have paid the commissions. On that settlement, the defendant in error was found to be indebted in a sum exceeding $20,000. At this time the defendant paid a portion of the sum in which it was found to be indebted, and gave drafts for the residue payable in a few months thereafter. More than two years after the settlement and after the payment of the drafts, this suit was brought. On the trial the objection does not appear to have been taken that the settlement could be overthrown only on proof of fraud, mistake or ignorance of legal rights in making it; but the merits of the claim made by the plaintiffs in error for the commissions were inquired into, as if no settlement thereof had previously been made. The actual payment of the commissions by the plaintiffs in error was not strongly questioned; but whether they had been paid in good faith, or in a heedless and improvident manner was the contention. They had been paid to Shoemaker & McIntyre, who were coal brokers. The plaintiffs in error sought to prove a faithful and careful performance of their agency. In furtherance of this object it was clearly evidence of good faith and prudence, for them to show that they had sold according "to the usual and customary method of the Philadelphia coal trade," and that such method was to sell "through the agency of brokers to whom a commission was paid." It was here the office of the parties was kept and their business transacted. It is urged that the offer is insufficient inasmuch as it does not propose to prove a usage based upon a custom "which was established, uniform and general." It is true, the offer is not in these precise words, yet we think the language imports substantially the same meaning. "Usual and customary" clearly import something more than casual or exceptional cases. They indicate such a

fixed and established usage as to be declared general by the trade. Besides, it is not necessary to prove all the elements of a custom necessary to make a law; the object here is to interpret a contract. The usages of a particular trade or business are presumed to be known to those engaged therein. There may, therefore, in the absence of any express stipulation inconsistent therewith, be supposed to have entered into the understanding of the parties in making the contract. They furnish a most valuable aid in arriving at the mutual assent of the parties, and when not contrary to law, are admissible in evidence: *Lewis* v. *Marshall*, 7 M. & G. 744; *United States* v. *Duval*, 1 Gilpin, 372; 2 Greenl. Evid., § 251; *Finners* v. *Howe*, 8 Wend. 247; *Outwater* v. *Nelson*, 20 Barb. 29; *Girard Fire & Marine Insurance Co.* v. *Stephenson*, 1 Wright, 293; *Helme* v. *The Philadelphia Life Insurance Co.*, 11 P. F. Smith, 107; *McMasters* v. *The Pennsylvania Railroad Co.*, 19 Id. 374.

The evidence shows the Reading Railroad Company purchased the largest quantity of the coal. Such a purchaser may well have been considered very desirable. If so, it was certainly pertinent to show that those sales could only be made through Shoemaker & McIntyre. We think, therefore, the evidence covered by the third and fifth assignments should have been received. The seventh assignment is to that portion of the charge of the court wherein it is said, "the defendants held a large majority of the stock of the company, *therefore* the control of the company was entirely in their hands." It is true Carter & Co. did hold a majority of the stock, but they had accepted it under an arrangement by which they were to have a minority of the directors.

The board consisted of five directors; Carter & Co. were to have and in fact did have, only two of them. All the coal in question was sold within one year. No change of directors was made within that time. The controlling management was therefore in the other three directors. Under the circumstances, and for the time in question, a majority of the stock did not put "the control of the company entirely in the hands of Carter & Co." and in so charging, the learned judge erred.

Inasmuch as the reason given for the removal of the secre-

tary was not made known to the plaintiffs in error, they ought not to be affected thereby. It therefore follows that the evidence covered by the first assignment ought not to have been received.

Judgment reversed and a venire facias de novo awarded.

MARYE v. STROUSE.

(6 Sawyer, 204; 5 Fed. Rep. 483. U. S. Circuit Court, Dis. of Nevada, 1880.)

Agent, both buyer and seller. The law does not permit an agent to purchase on account of another, that which he sells on account of himself.

Broker's contract. An ordinary broker's contract, for the buying of stock, each share of which has a distinct and independent value, can not be regarded as entire.

Custom—Broker's charges. A custom among mining brokers of charging each customer the full price of a telegram upon the receipt of a dispatch containing several orders, if it can be considered reasonable, ought to be established by very satisfactory proof, and it should also appear that both parties had knowledge of it.

Account stated—Interest—Appropriation. The balances struck in a pass-book copied from a broker's ledger, from time to time, when brought to him, and at all other times retained by the defendant, to whom it was given for the express purpose of showing how his account stood, is an account stated, and will bind the defendant to pay the rate of interest therein stated, viz.: two per cent. per month, notwithstanding a statutory provision that "when there is no express contract in writing fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum for all moneys," and money paid on account may be applied to the payment of such interest, if the debtor fails to make any appropriation.

KIRKPATRICK & STEVENS and LEWIS & DEAL, for plaintiff.

JONAS SEELEY & B. C. WHITMAN, for defendant.

HILLYER, D. J.

This is an action to recover a balance alleged to be due upon a mining stock account. The complaint alleges the purchase, upon defendant's request, of a large amount of mining stocks; the expenditure of money for telegrams in connection with the buying and selling of the stocks; the advances of

money on purchases, and the agreement of defendant to pay interest thereon at the rate of two per cent. per month. It also contains a number of counts upon accounts stated.

The answer puts in issue the purchase of five hundred shares of Franklin stock at three dollars per share; denies the correctness of the charges for telegrams, and any agreement to pay interest at the rate of two per cent. per month.

These are the only issues raised. The facts bearing upon each point can be best stated as it is decided, both for convenience and to avoid repetition. The facts in regard to the purchase of the Franklin stock are that the defendant requested the plaintiff's assignors, Frankel & Block, stock brokers, to buy for him five hundred shares of Franklin, at a limit of three dollars per share. Frankel & Block purchased in the San Francisco stock board next day, in the usual way, one hundred and twenty-five shares of Franklin, that being all that could be obtained at three dollars per share. At the same time Frankel, one of the members of the firm, being a large owner of Franklin stock, turned over to Frankel & Block, for the purpose of filling the defendant's order, three hundred and seventy-five shares of Franklin at three dollars per share, which were then applied by the firm to that purpose, and were charged to the defendant with the usual commissions and telegrams. The defendant never received the stock into possession, and never assented to this mode of filling his order, nor did he know it had been so filled, until about the time of bringing this suit.

The rule of law applicable to this state of facts is settled. An agent employed to buy can not become the seller, in the absence of his principal's assent given upon full knowledge of the facts. Frankel & Block, as agents of Strouse to purchase, could not be the sellers. It is not claimed that there was any fraud in fact here, but evidence establishing the transfer of the stock to have been *bona fide* and for a fair price, is unavailing. The inquiry does not reach the question whether there was or was not fraud in fact. It stops when it is ascertained that the agent was both buyer and seller. The law then declares the sale invalid, if the principal elect to so consider it, not because all sales so made are in fact fraudulent, but because it will not permit any trustee or agent to purchase on account of another that which he sells on account of him-

self. It does not permit the agent to be led into temptation by an act which raises a conflict between his integrity and his self-interest.

The Supreme Court of the United States announces this doctrine in very strong terms, and with unanimity in *Michoud* v. *Girod*, 4 How. 503. The current of authority in England as well as here, is all the same way: 4 Kent. Com. 7th Ed. 475; *Conkey* v. *Bond*, 34 Barb. 276.

The manner in which the stock passed from Frankel to Frankel & Block, and from them to Strouse, does not, in my judgment, essentially alter the case.

The fact that an account may have been stated between the defendant and Frankel & Block, in which this item of five hundred shares of Franklin was included, does not bind the defendant if he stated the account in ignorance of the fact. I appears that Frankel & Block never informed the defendant how the purchase had been made, and that the defendant did not in fact know of it until at or about the time of bringing this suit. The charge in the account which was rendered to defendant, being for five hundred shares of Franklin at three dollars per share, gave him no information in regard to the person from whom the stock was purchased. The charge was for the quantity, and for a price within the limit of his order, and he may, and naturally would, have supposed it had been filled in the regular way. There was nothing to put him on inquiry, and he may now open the account for fraud, actual or constructive. So any payments the defendant may have made in ignorance of the facts can not be binding upon him, however appropriated, so as to prevent him from avoiding the transaction when he discovers the truth.

So far, then, as the three hundred and seventy-five shares are concerned, it seems clear that there is no liability on the defendant's part. But that he is properly chargeable with the one hundred and seventy-five shares, which were regularly purchased in the board has hardly been seriously controverted.

It was suggested, however, rather than argued, that the order for five hundred shares might and ought to be regarded as an entire contract, and that the defendant was not bound to take less than the whole five hundred shares. A sufficient answer to this position is that upon receiving the defendant's order to buy five hundred shares at a limit of three dollars, the under-

taking of Frankel & Block, as brokers, was, not to deliver the whole absolutely, but to buy so much as could be bought in the regular way below or at the limit. Moreover, there are no circumstances in this case showing, or tending to show, that the defendant regarded the purchase of the whole number of shares as essential to the value of a part. An ordinary broker's contract for the buying of stock, each share of which has a distinct and independent value, can not be regarded as entire. The result upon this stock transaction is that the defendant is entitled to a credit for three hundred and seventy-five shares at three dollars per share for commissions, and for interest thereon at the rate of two per cent. per month from September 28, 1874, down to the —— day of ———, 187–, and at ten per cent. per annum thereafter, so long as these rates have been charged against him in the account sued on.

The charges for telegrams were made in this way: Frankel & Block were in the habit of receiving orders daily for the purchase and sale of mining stocks. It often happened that a number of orders would be sent to San Francisco in one dispatch. In such case the practice was to charge each customer having an order therein seventy-five cents (that being the proper charge for a single telegram of ten words), although such customer's proportion of the actual cost was often, if not always, much less. Sometimes a single order would be sent for one customer, and then the actual cost of the telegram was charged. But how often this may have been done in defendant's case nowhere appears. No effort was made to keep an account of the sums actually paid out for telegrams about his business. The plaintiffs defend these charges on the ground that they are in accordance with an established custom of mining-stock brokers. The testimony fails to bring knowledge of this custom, if any, home to Strouse. He never agreed to the charges, nor did Frankel & Block ever inform him of their character. He, himself denies any knowledge of the custom, if it be a custom.

I think also that the testimony fails to show that the alleged custom had existed so long, and was so generally known, that the defendant ought to be presumed to have had knowledge of it, and to have contracted with reference to it. The only evidence on this point is that of Mr. Frankel. In answer to

the question whether this mode of charging "was a custom among the brokers and was well known," his answer is: "I tell everybody, make no bones about it." Again he answers: "It (the mode of charging) is well known; we don't make any bones about it—tell everybody." This shows that there was nothing clandestine about the charges, but does not show a certain and uniform custom among brokers which was known to both parties. A custom or usage like this, of charging customers in addition to commissions, not merely the actual cost of telegrams, but an arbitrary sum ordinarily much more than the actual cost, if it can be considered reasonable, ought to be established by very satisfactory proof, and it should also appear that both parties had knowledge of it. Strouse says that he expected to pay the actual cost of the telegrams about his business, but nothing more. There is, however, no proof showing what the real cost was. It being conceded that the charge is excessive, unless supported by custom, the burden of showing what the real cost of telegrams was, is on the plaintiff. But this has not been done, and the charge must stand or fall as a whole. I do not think it can be sustained upon the ground of custom.

Nor do I think that, in reference to these charges, the defendant has lost his right to object to them because he may have stated an account including them, or because payments made by him may have been appropriated by Frankel & Block to their payment. For this reason: the account as rendered to defendant contained the usual charge of the telegraph company for a dispatch of ten words or less, viz., seventy-five cents, and while the charge was false in fact, it would appear to the defendant to be true, so long as he remained ignorant of the brokers' habit of charging. Until this became known to him there was nothing on the face of the account calling for objection by him. As to usage, see *Renner* v. *Bank of Columbia*, 9 Wheat. 581; *Bowling* v. *Harrison*, 6 How. 248; *Pierpont* v. *Fowle*, 2 Woodb. & M. 23.

The only other portion of the account objected to by the defendant consists of the various charges for interest, at the rate of two per cent. per month, which he asserts are illegal, because no agreement in writing has ever been made to pay that rate. The plaintiff claims that all items of interest accruing prior to August 1, 1875, are included in a number of accounts

stated, contained in a book in evidence called a "broker's pass book;" and that since, under the law of this State, there is nothing illegal in a verbal agreement to pay interest at the rate charged, an account stated may lawfully be settled by the parties with items of interest at that rate entering into the balance struck and agreed to.

A statute of Nevada provides that "when there is no express contract in writing fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum for all moneys." "Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due." After judgment, the original claim bears interest at the contract rate. There is nothing anywhere in the statute prohibiting persons from paying or receiving any rate of interest they choose. The only effect of the law is to prevent a recovery by suit of more than ten per cent. per annum when there is no agreement in writing. Properly speaking, two per cent. per month is not an illegal rate of interest in Nevada. If parties see fit to contract in writing, any rate so fixed can be recovered; but if the agreement is not reduced to writing they can not have the aid of the courts in enforcing it when the debtor refuses to abide by the verbal agreement. In such case, however, the agreement being fair and perfectly understood by the party charged, such interest may be included in the balance agreed to upon stating an account. There is nothing in that opposed to good morals or to the policy of the law in this State. And since the stating of the account alters the nature of the debt and amounts to a new promise (2 Greenl., sec. 127), and it is not necessary to prove the items of the account, but simply the assent, express or implied, of the debtor to the balance stated, a recovery may be had upon such an account unless it is successfully impeached for fraud or mistake.

Under the circumstances of this case, it appears to me that the balances struck in the "broker's pass book" must be regarded, upon settled principles of law, as accounts stated. The book is kept for the express purpose of showing the customer how his account stands. It has on the debit side charges against Strouse for stocks bought, commissions, telegrams, assessments, and interest. On the credit side appear the pro-

ceeds of stocks sold, money paid in on account, and dividends collected. The course of business in the broker's office was to balance all stock accounts at the end of each month. This balance was carried forward as the first item of the next month's account. Interest on all advances during the month, as well as on the balance brought forward from the preceding month, was charged at the rate of two per cent. per month at the expiration of each month, and went into the balance struck. The pass book is a copy of the broker's ledger. Whenever it was brought in by the defendant it was written up by copying into it the entries from the ledger and then returned to him, he having at all other times possession of the book. The first balance was struck August 31, 1874, and the last, July 31, 1875. Every account and every balance made contains a charge for interest at the rate of two per cent. per month. In charging the item for interest it is not stated to be at the rate of two per cent., but the amount shows that to have been the rate. No objection was ever made by the defendant to this, or any other portion of this account, until the beginning of this suit in November, 1877. It thus appears that he retained the last account more than a year without objection. This warrants fully the presumption that he acquiesced in the accounts, and it is unnecessary that he should have given an express assent: *Wiggins* v. *Burkham*, 10 Wall. 129.

The defendant, however, says that acquiescence ought not to be presumed, because he did not in fact know what rate of interest was charged to him in his accounts. It is, perhaps, a sufficient answer to this to say, that having been in the receipt of these monthly accounts for a year, if he did not know he should have known; that he was bound to examine them enough to discover what a very slight examination would have disclosed, upon the principle that a party is chargeable with knowledge when the means of knowledge are within his reach: *Ogden* v. *Astor*, 4 Sandf. 332. It would indeed be wrong to permit the defendant to lie by without objection, while his broker advanced large sums for him, upon the understanding that the rate of interest was to be as charged.

But there can be no reasonable doubt that Strouse did know and assent to the rate of interest as charged. His account

was large, the interest charge alone, some months, amounting to over eight hundred dollars.

The account for July, 1875, is as follows:

July 1.	To balance	$39,695.73
10.	Assessment 200 Daney	100.00
30.	30 Ophir, $57	1,710.00
	Commissions and Telegrams	18.60
31.	Interest	817.50

CR.

July 12.	By dividend 50 Con. Virginia	$ 500.00
31.	Balance	41,841.83

It is impossible to believe that any business man could receive so simple an account and not know from it the rate of interest he was charged. The testimony shows that these accounts were rendered for the purpose of informing the defendant how his account stood. The dealings between the parties extended through a period of over two years, during all of which time interest was charged monthly at two per cent. It appears also that at this time the bank rate as well as the brokers' rate, in Virginia City, was two per cent. per month, and that the defendant did business with nearly or quite every broker and banker in the city. I find then, that Strouse knew the rate of interest charged against him in his account. There was no mistake or fraud about it. Having this knowledge he not only receives and retains accounts without objections but even pays them. The method of keeping and rendering accounts continued so long as to become a regular course of dealing between the parties. Under such circumstances the authorities are clear that an account stated can not be opened because an item of interest which went into it could not have been recovered by suit, provided such item is not illegal: *Backus* v. *Minor*, 3 Cal. 231; *Young* v. *Hill*, 67 N. Y. 163; *Bainbridge* v. *Wilcocks*, Bald. 536; *Freeland* v. *Heron*, 7 Cranch, 147.

After July 31, 1875, no accounts were stated between the parties. The defendant did not bring his book in to have it written up after August, 1875. The balance against him July 31st, was $41,841.83. Dealings still continued between the parties as before for a long time, the last item on the debit

side bearing date December 24, 1876, and the last on the credit side August 14, 1877. After August 1, 1875, the account was kept on plaintiff's books as before. Monthly balances were struck, embracing current charges and interest, as well on the balance from the preceding month as on current advances.

Credits arising from sales of stock, dividends or cash, were set opposite these charges, and deducted from the debit side, the balance so struck being carried forward and making the first item of the next monthly account. The defendant paid in all moneys generally on account, never making any application of them, but they were applied as paid in or received by the brokers to the payment of all back indebtedness, including the interest at two per cent., the application being made to that account which had accrued first in point of time.

The right of the plaintiffs to apply the payments so made to that portion of the account which is for interest at two per cent. per month is denied. The argument is, that the charge for interest is illegal, and while the creditor in this case had a right to apply the payments, his right is confined to demands which are legal and can be enforced. Upon this point the law seems to be entirely settled. So far as I can discover there is no conflict of authority. The established rule is, that when a creditor has two demands, one of which is lawful and the other unlawful—that is to say, arising out of some contract prohibited by law—the creditor can apply an unappropriated payment only to the lawful demand: *Rohan* v. *Hanson*, 11 Cush. 44; *Caldwell* v. *Wentworth*, 14 N. H. 431; *Bancroft* v. *Dumas*, 21 Vt. 456.

But many demands are lawful which can not be recovered by a suit at law, and to the payment of all such demands the creditor may lawfully apply money paid to him by his debtor whenever the debtor fails to make any appropriation. Thus a debt barred by the statute of limitations may be liquidated in preference to debts not barred: *Ramsay* v. *Warner*, 97 Mass. 8; *Mills* v. *Fowkes*, 5 Bing. N. C. 455; *Williams* v. *Griffith*, 5 Mee. & W. 300. So in cases where no recovery can be had because the promise is not in writing as required by the statute of frauds: *Haynes* v. *Nice*, 100 Mass. 327; *Murphy* v. *Webber*, 61 Me. 478.

In like manner where a statute did not prohibit the sale of liquor, but enacted "that no person should maintain any action for sums for or on account of spirituous liquors," it was held that the sellers might apply an unappropriated payment to the account for liquors, and sue for other articles: *Philpott* v. *Jones*, 2 Ad. & E. 41; *Cruickshanks* v. *Rose*, 1 Moo. & R. 100. So where the creditor had an equitable demand arising out of partnership relations, he was allowed to apply payments made generally to the equitable claim, and sue at law for his legal demand: *Bosanquet* v. *Wray*, 6 Taunt. 597. These cases illustrate the distinction which is made between contracts "which the law simply declines to enforce and those which it directly prohibits": *Phillips* v. *Moses*, 65 Me. 70.

Payments may be applied by a creditor to demands not recoverable at law, when no statute prohibits the contract, but simply denies a remedy to enforce them. In such cases the contract is not illegal, and the money, if voluntarily paid, can not be recovered back. But the right does not extend to contracts which are "prohibited by law under heavy penal forfeitures, and payments which may at once be recovered back because illegal." So held where payment had been applied to a grossly usurious contract which could not have been enforced, and the law gave the debtor a right to recover back three times the amount paid for usurious interest: *Rohan* v. *Hanson*, *supra*.

That under the statute of Nevada, an agreement to pay two per cent. per month interest is lawful, although not in writing; and that such interest is a proper item to enter into an account stated, has just been decided. It is equally clear that under the same statute it is perfectly legal to pay that rate without any written agreement to do so. Money so paid can not be recovered back, if the payment was voluntary. In the recent case of *Marvin* v. *Mandell*, 125 Mass. 562, the decision was upon a statute of that State, which allows parties to contract in writing, for any rate of interest; but unless the contract is in writing, no more than six per cent. can be recovered by action; and upon this it was held that without a written contract it was lawful to pay and receive a greater rate than six per cent., and that when voluntarily paid it could not be recovered back.

In this case the last payment was made some months before any controversy arose about the charge for interest, and there is but one conclusion possible upon all the authorities, and it is that the creditors had a lawful right to apply the unappropriated payments of Strouse to extinguish the oldest items of the account, including those for interest at the rate of two per cent. per month. Had the creditors done nothing more than to set the items of credit opposite the debits, this of itself would have amounted to an application of them to the payment of those debts: *Clayton's Case*, 1 Meriv. 608; Willard Eq. 102. And in the absence of any specific application by either party the law would apply the credits as Frankel & Block did, to the payment of the items and balances "according to priority of time": Id.; *U. S.* v. *Kirkpatrick*, 9 Wheat. 720.

My conclusion upon the whole case is, that there must be a general finding of facts for the plaintiff, the amount of the judgment to be ascertained in accordance with the foregoing opinion.*

1. A person not engaged in business as a broker, may recover on a special contract, without having taken out a broker's license: *Shepler* v. *Scott*, 85 Pa. St. 329; *Post* CONTRACT.

2. A sale resulting more than a year after the introduction of the parties by the broker, *held*, too remote to sustain his action: *Harris* v. *Burnett*, 2 Daly (N. Y.), 189.

3. A broker can not recover compensation from both parties: *Id.*

* Opinion on motion for new trial omitted.

ATTWOOD ET AL. v. FRICOT ET AL.

(17 California, 38. Supreme Court, 1860).

Records as evidence. The record of the transfer of a mining claim is admissible in evidence to show compliance with the miners' rule requiring such record, but not to prove the fact of the transfer.

Depositions — Reasonable notice. Plaintiffs' attorneys offered several objections to the admission in evidence of certain depositions, based upon the fact that the copy of the order of the judge for taking the depositions, upon which they had acknowledged service in writing, was not a perfect copy, in that it did not mention the notice to be given. But the objections were overruled. *Held*, that the court properly exercised its discretion. *Held*, also, that reasonable notice should be given to a party, of the time and place of taking testimony; but what is reasonable notice depends upon the particular circumstances.

Possession of mining claims. The possession of mining claims is regulated by usage and local rules and *possessio pedis* can scarcely be required to give a right of action for the invasion of it. When the limits of the claim are defined and one enters in pursuance of the mining rules or under color of title, the possession of a part as against any but the true owner or prior occupant is possession of the whole; nor would a third person have a right to invade such possession and set up title in a stranger with which he had no connection.

Damages for trespass. It is error to instruct a jury that if they believe no injury or damage was done by defendants to plaintiffs, they should find for defendants. The law presumes damages from a trespass.

Presumption of injury from erroneous charge. The error in a charge to the jury being apparent, injury is presumed, and the presumption should be affirmatively replied to.

Appeal from the Fourteenth District.

Action for damages and prayer for injunction restraining defendants from working certain mining claims.

The evidence showed that Stevenson and others located certain mining claims in 1850 and 1851 which were situated on Massachusetts and New York Hills near Grass Valley in Nevada County, and in accordance with a local custom they worked the same under the name of the Nevada County Gold Mining Company as a corporation, until in 1853 the company leased the claims to Hepburn and Attwood for ten years, who took possession and worked them until December, 1858, when

Hepburn transferred his interest to Attwood and others, who are plaintiffs.

Before the commencement of this suit the defendants entered upon one of the leased claims and began to work the same, claiming title thereto; thereupon plaintiffs brought suit, claiming to be the owners and in possession of the claim.

Among other evidence offered by the plaintiffs was a book purporting to be a record of mining claims containing an entry of a transfer of the claims from the original locators to the Nevada Gold Mining Company, to which evidence defendants objected. The court excluded the entry until plaintiffs should first prove the fact of the transfer, stating that the entry would then be admitted to show a compliance with the mining rules requiring such record, to which ruling the plaintiffs excepted.

Defendants offered in evidence the depositions of Hawes and others, taken March 12, 1859, to which plaintiffs objected, because—1st, The copy of the order of the judge, fixing the time for taking such depositions, did not mention the notice to be given. 2d, Because no correct copy of said order was served on plaintiffs or their attorney. 3d, Because no sufficient notice of the taking of such depositions was ever given to plaintiffs or their attorneys. The objection was overruled; and the reason assigned by the court is, "Because the original order of the judge, made on affidavit, fixed the time of notice at three days, and because counsel for plaintiffs acknowledged service in writing of a copy thereof on the 8th of March, 1859, more than three days before the taking of said deposition." Plaintiffs excepted.

The instructions for defendants were:

1st. That to enable the plaintiffs to recover in this action, the jury must find from the evidence that the plaintiffs were in possession of the mining grounds in dispute at the time of the alleged grievances, and that such possession of plaintiffs was rightful as against defendants.

2d. That to maintain their action the possession of plaintiffs must be actual or constructive.

Actual possession is where a party has the exclusive control and dominion over and occupation of the property at the time of the alleged trespass.

Constructive possession is where the property is not in the actual occupation of any one, but where it rightfully belongs to the owner, and where the owner may take it into his own hands at his pleasure.

3d. That a party relying upon prior possession alone, must show such possession to be actual and exclusive.

4th. If the jury find from the evidence that the plaintiffs had not either the actual or constructive possession of the mining claims in dispute at the time of the alleged trespass, then they will find for defendants.

5th. That if the jury believe from the evidence that the mining claims on New York Hill, here sued for, were located and held by different persons, that the original locators never transferred their claims to the Nevada Gold Mining Company, the lessor of plaintiffs, then that plaintiffs acquired no constructive possession of said mining claims by virtue of the lease from the said mining company.

6th. That the plaintiffs obtained no greater right or title to the claims mentioned in the lease than that which the lessor thereof had at the time when the same was made; and that if the lessor thereof had no right or title in the ground in dispute at that time, the said plaintiffs, the lessees, acquired none.

7th. That if the jury believe from the evidence that no injury or damage was committed or done by plaintiffs to defendants, then they will find for defendants.

To which instructions plaintiffs excepted generally. The jury found for defendants; judgment accordingly. Plaintiffs appeal.

HENRY MEREDITH, for appellants.

DIBBLE & LANSING, for respondents.

BALDWIN, J., delivered the opinion of the court—FIELD, C. J., and COPE, J., concurring.

We do not think it necessary to go into a full examination of this case, for on another trial all the questions here made probably will not arise.

1. The first error assigned is the ruling of the court excluding the entry of the transfer made on the books of the

recorder, as proof of the fact of transfer. We think the ruling right. The book was admissible as evidence of a compliance with the rules of the mining district, and this particular entry admissible to show the compliance with the miners' rule requiring the recording of transfers. But we see no mining regulation which makes this memorandum of the recorder primary evidence of the fact of transfer; and know of no principle of the law of evidence which would authorize such effect to be given to it.

2. The court did not err in overruling the objections to the depositions of Hawes, etc. The objection assigned was a matter to be considered by the court, and its discretion seems to have been properly exercised. Reasonable notice should be given to a party of the time and place of taking testimony; but what is reasonable notice, depends upon the particular circumstances.

3. We are inclined to think that some of the instructions given at the instance of the defendant, whether correct or not as abstract propositions applicable to real estate, had a tendency to mislead the jury when applied to the facts of the record. Mining claims are held by possession, but that possession is regulated and defined by usage and local conventional rules, and the "actual possession" which is applied to agricultural lands, and which is understood to be a *possessio pedis*, can scarcely be required in a mining claim in order to give a right of action for the invasion of it. The claim must be in some way defined as to limits, of course, before the possession of or working upon part gives possession to any more than that part so possessed or worked. But when the claim is defined, and the party enters in pursuance of mining rules and customs, the possession of part is the possession of the entire claim. And so if a party enters *bona fide* under color of a title, as under a deed or lease, the possession of a part as against any one but the true owner or prior occupant is the possession of the entire claim described by the paper; and this though the paper did not convey the title. The condition of the possessor, in such instances, would not be worse than that of the occupant of other real estate, in which case this rule applies. A third person would have no right to invade the possession of the party taking it under such circumstances, and set up, as against him, out-

standing title in a stranger, with which he had no connection. This principle does not touch the case of an entry into possession in pursuance of mining rules and regulations, as for a forfeiture or abandonment, etc.; but the case we suppose is of a possession taken independently of such rules.

These observations will enable the court below to apply the law to the facts in a concrete form on the return of the case.

The court erred in instructing the jury, that if they believed no injury or damage was done by defendants to plaintiffs, they would find for the defendants. This instruction was calculated to mislead. The law presumes damages from a trespass; and the jury might well have decided the case upon this want of proof of plaintiffs' damages, instead of absence of proof of their title. The error being apparent, injury is presumed; and the respondents have not affirmatively replied to the presumption.

Judgment reversed and cause remanded for a new trial.

McKeon v. Bisbee.

(9 California, 137. Supreme Court, 1858.)

Mining claim may be sold on execution. The interest of a miner in his mining claim is property, and is liable to seizure and sale under execution.

Appeal from the District Court of Eldorado County, Eleventh Judicial District.

The plaintiff obtained judgment in the court below and defendant appealed.

Hall & Hume, for appellant.

Sanderson & Newell, for respondent.

Terry, C. J., delivered the opinion of the court—Burnett, J., concurring.

This was an action to recover possession of a mining claim, the plaintiff alleging title and prior possession. The defendant set up a title by purchase at a sale under execution. A demurrer to the answer, on the ground that the facts stated constituted no defense, was sustained by the court below, and a judgment rendered in favor of plaintiff.

The question presented is, whether a mining claim is liable to seizure and sale under execution?

By our statute, "all goods, chattels, money, and other property, real and personal, of the judgment debtor, not exempt by law," is liable to execution.

Property is the exclusive right of possessing, enjoying, and disposing of a thing: it is "the right and interest which a man has in lands and chattels, to the exclusion of others;" and the term is sufficiently comprehensive to include every species of estate, real or personal: 17 Johns. 283; 14 East. 370.

The legislature have, by a series of enactments, recognized the right of the miner to take and occupy, for mining purposes, a portion of the public domain, and have provided a remedy by action against all who trespass on his possession.

"By this appropriation he acquires a vested interest in the exclusive occupation and enjoyment of the land, as against all the world, subject only to the right of the government by whose license and permission his possession was acquired; and his right to protect the property, for the time being, is as full and perfect as if he was the tenant of the superior proprietor for years, or for life": *Merced Mining Company* v. *Fremont*, April Term, 1857, 7 Cal. 130, 317.

He has, in addition to the right of exclusive possession and enjoyment, the right of absolute disposition; and may sell, transfer, or hypothecate, without let or hindrance from any one. Contracts for the sale of such interests have been frequently recognized and enforced by the courts.

We think the interest of a miner in his mining claim is property, and not having been exempted by law, may be taken in execution.

Judgment reversed, and cause remanded for further proceedings.

McGARRITY v. BYINGTON ET AL.

(12 California, 426. Supreme Court, 1859.)

Review on imperfect record. The appellate court will not review the decision of the court below in refusing to sustain a motion for nonsuit when the grounds of the motion do not appear in the record.

Proof of signing conveyance. C., the subscribing witness to a bill of sale, being out of the State, T., the grantee, swears that he saw C. witness it, and D., the grantor, sign it, and that he recognized the paper from the contents read to him, though not able to read himself. L. swears that the signature of C. is in his handwriting. *Held*, that the paper was sufficiently identified to be read in evidence.

Idem. Testimony by a subscribing witness that a paper was signed in his presence "to the best of his recollection" sufficiently identifies it to be read in evidence.

Irrelevant testimony. A judgment will not be reversed because of the admission of irrelevant testimony unless it is clearly made out to be irrelevant, and even then it ought to be shown that the proof tended to mislead or unduly influence the jury.

Mining records as evidence. The original record of mining claims having been destroyed, plaintiff was allowed to introduce a new record of mining claims which had been prepared in pursuance of a resolution of miners requiring claims to be recorded, *held* to be competent to prove that the claim had been recorded according to the rules of the vicinage.

Evidence. Testimony which is *prima facie* irrelevant is properly excluded unless counsel explain how it is admissible or offer to connect it.

Forfeiture. A right of property, once attached in a mining claim, does not depend upon mere diligence in working it, and a failure to comply with *any one* of the mining regulations is not a forfeiture of title. It would be enough to hold the forfeiture as the result of a non-compliance with *such* of them as make non-compliance a cause of forfeiture.

Estoppel by silence. It is not the making of improvements or expending of money on another's property which entitles the person so expending to hold the property, or even the improvements; but it is the fraud of the owner, who silently, or otherwise, encourages the expenditure.

Labor on mining claims. The proposition "that all efforts made and work done outside of the limits of the claim in dispute, with a *bona fide* intent to work the claims, are justly considered as work done upon the claims by relation and intendment" can not be maintained.

New trial—Conflicting evidence. The appellate court will not overrule an order of the court below refusing a new trial when the evidence is conflicting.

Entitling verdict. It is not necessary that a verdict should be entitled.

Appeal from the District Court of Sierra County, Fourteenth Judicial District.

Action of ejectment for the recovery of mining claims.

The plaintiff in his complaint alleges that he was seized, possessed, etc., of the premises in controversy, and that on the first day of June, 1857, defendants entered, etc., and ejected him (plaintiff) and continue to withhold possession of said premises from plaintiff, and prays restitution.

The answer admits the possession of defendants, but justifies under a claim of prior possession. The cause was tried by a jury.

On the trial, Samuel Thomas, a witness for the plaintiff, was shown a certain bill of sale from Day to the witness, Thomas, for an undivided interest in the premises in dispute. Thomas testified as follows: "I recognize Day's signature. Clark, who witnessed the bill of sale, has gone to the States. I saw Clark witness it; saw Day sign it. I can't read writing. * * * I can identify the bill of sale only by its reading the same as the one given to me."

E. S. Lester was then called by the plaintiff, and testified that the signature of Clark to the bill of sale "is his true signature, to the best of my knowledge."

Plaintiff then offered the bill of sale in evidence, and it was admitted, under the objection of defendants.

J. C. Lester, a witness for plaintiff, was shown a deed of conveyance of the premises in dispute from Irwin, Thomas and McGarrity, to E. S. Lester, and testified as follows: "I signed my name to this paper as subscribing witness. I don't know who signed the name of Thomas or McGarrity; think Irwin wrote them; don't know whether Irwin signed it in my presence, or not; don't know that Thomas or McGarrity made their marks in my presence, but to the best of my recollection they did."

Plaintiff then offered the deed of conveyance in evidence, which was admitted under the objection of defendants.

The paper mentioned in the opinion of the court as Exhibit E is a contract between the Meredith Mining Company, of the first part, and McGarrity (plaintiff) of the second part, for the privilege and right of way by plaintiff through a tunnel of the Meredith Mining Company, near the plaintiff's claims, for the purpose of draining the claims in dispute. This paper bore date June 8, 1858. For what purpose it

was offered in evidence does not appear from the record. Defendants' counsel objected to the introduction of the paper in evidence, upon the ground of irrelevancy. The court overruled the objection, and the instrument was read in evidence.

Plaintiff then proved, for the purpose of laying the foundation for the introduction in evidence of the record book of mining claims, that the original record of mining claims in that district was destroyed by fire; that plaintiff's claims were recorded in it; that after the destruction of the original records, the miners by a resolution required claims be re-recorded; that one Clark was recorder, and the record book in court was in his handwriting. The plaintiff then offered the book in evidence. Defendants objected, upon the ground that it was not the original record, and was not proven to be a true copy. The objection was overruled, and the book admitted in evidence. At the close of the plaintiff's testimony, the defendant moved the court to nonsuit plaintiff. Motion was denied by the court.

Counsel for the defendants offered in evidence a deed executed by one Ray, as constable, to the defendant Byington, conveying the premises to Byington by virtue of a levy and sale under an execution against James M. Cobb & Co. There are no facts stated in the record showing the relevancy of this deed to the question at issue. No title was shown in Cobb & Co. at the time of levy, nor was there any offer to show title in them at any time. The plaintiff asked the court to give to the jury, among others, the following written instruction:

"5th. If the jury believe, from the evidence, that plaintiffs have a better title to the ground in dispute than defendants have, they must find for plaintiffs." This instruction was given under the objection of the defendants.

The defendants asked the court to give to the jury, among others, the following written instructions:

"7th. If the jury believe, from the evidence, that the mining ground in dispute could have been worked by running a drain tunnel from a point below the same, and that the plaintiff, or those under whom he claims, failed to use due diligence in commencing or prosecuting such work, or if the plaintiff, or those under whom he claims, has failed to comply

with any usage or custom of said mining district in locating or working said claims, then they must find for the defendants."

"11th. If McGarrity or his grantors, knowingly though silently, by looking on, suffered the defendants, or those under whom they claim, under a mistaken claim of title, to expend money and perform labor for the purpose of opening or working the claims in dispute, then he or they are estopped from setting up any claim against the defendants, and in such case the jury must find for the defendants."

"13th. That all efforts made and work done outside of the limits of the claims in dispute, with a *bona fide* intent to work the claims, are justly considered as work done upon the claims by relation and intendment."

The court refused to give these instructions, and defendants excepted. Plaintiff had verdict and judgment, and defendants appealed to this court.

R. H. TAYLOR, for appellants.

VANCLIEF & STEWART, for respondent.

BALDWIN, J., delivered the opinion of the court—FIELD, J., concurring.

Ejectment for mining claims.

Many points are made by the appellants. We shall consider them very briefly: 1st. That the court improperly refused to nonsuit plaintiff. The answer is, the grounds of the motion do not appear; therefore we can not consider it: 10 Cal. 267. 2d. Error in the admission of bill of sale from Day to Thomas. Clark, the witness to the bill, was out of the State. Thomas swears he saw Clark witness it, and saw Day, the grantor, sign it: true, he says on cross-examination that he can not read, but recognized the paper from the contents read to him; but Lester swears that the signature of Clark, the subscribing witness, is in his handwriting. The proof, then, identifies the paper as that which Thomas saw the grantor and subscribing witness sign. This was enough to admit it to be read. Exhibit B is proved by Lester sufficiently. It is true the witness says it was signed in his presence,

"to the best of his recollection;" but this is enough. The other objection to admission of papers need not be stated. It suffices to say that the points made against their introduction are not well founded.

We do not see that Exhibit E was irrelevant; nor, if it were, that the error in admitting it was calculated to mislead the jury. Before reversing a judgment for this cause, the point should be clearly made out, even if any objection on this score be good, which does not show that the proof improperly admitted tended to, or might probably unduly influence the jury. Many things are admitted in the course of a long trial which have no relation to the merits of the case, yet it might not be proper to reverse a case because they were suffered to go in. The agreement shows an attempt by plaintiff to get possession of and work the premises in dispute on the day defendant got his title, and though not sufficient of itself to show actual possession, or a right of possession, yet shows a fact, which, in connection with other proof, tended to prove the *bona fides* of plaintiff's claim, or notice of it by defendant.

The record of the claim, made after the old records had been burned, was admissible, if for no other purpose, as showing that the regulations in that respect had been complied with. It may not have been competent, in this way, to prove the claim, but it was competent to prove that the claim of plaintiff had been recorded according to the rules of the vicinage.

The court did not err in refusing to admit the deed from Ray to Byington. Ray was not shown to have anything to do with the premises or the controversy. *Prima facie*, the deed was irrelevant. The rule in such cases is, that the counsel must explain *how* the testimony is admissible, or offer to connect it; otherwise there would be no limit to testimony as to quantity or kind. Not having done this the court had a right to reject it.

As to the instructions, the record does not show all the instructions; and it is very questionable whether we could, in such a case, consider the particular ones brought before us in review, as they may depend in a very great degree upon the rest. But we proceed to consider them. The fifth is, that if the jury believe the plaintiff has better title to the ground in

dispute than the defendants, they must find for the plaintiff. It is true, in ejectment the plaintiff must recover on the strength of his own title, but here the charge must be taken in connection with the case. There was no outstanding title, and only a question of prior possession. The charge did not amount to much, but what there was of it was very harmless. It amounted to telling the jury to find for the plaintiff if they thought they ought to.

The seventh instruction was properly refused. Especially in the absence of any custom or local regulation, a right of property once attached in a mining claim, does not depend upon *mere* diligence in working it. Not to work it may be a circumstance of some weight, tending to show abandonment, and this abandonment of a claim resting for validity only on possession, may be sufficient to defeat the title. But this principle is wholly different from that invoked. This is not inconsistent with the doctrine in *Kimball* v. *Gearhart*, which was the case of a ditch; in which case we held the right to depend upon the prosecution of a purpose to appropriate. The right of a mining claim vests by the taking in accordance with local rules. Nor is the other portion of the requested charge better sustained. The failure to comply with *any one* of the mining rules and regulations of the camp is not a forfeiture of title. It would be enough to hold the forfeiture as the result of a non-compliance with *such* of them as make non-compliance a cause of forfeiture.

The rule of estoppel invoked by the eleventh instruction requested to be given, is too broadly stated. It is not the making of improvements, or expending of money on another's property, which entitles the person so expending to hold the property, or even the improvements; but it is the fraud of the owner, who silently, or otherwise, encourages the expenditure. But this fraud only exists, at the very most, where the owner knows that the other person is making the expenditures, and also knows that he makes them under the *bona fide* reasonable belief that he is the owner of the property. Several of these important elements of this doctrine are left out of the charge.

The thirteenth instruction asked "that all efforts made and work done outside of the limits of the claim in dispute, with

a *bona fide* intent to work the claims, are justly considered as work done upon the claims by relation and intendment." This charge is not very clearly expressed; but the proposition can not be maintained as stated. To have the effect attributed, the work done *outside* must have some direct relation to the claim, or be in reasonable proximity to it. Besides, the phrase "all efforts made outside of the claim" would include many things, such as negotiation, traveling, preparations for work, contracts and the like, which could in no sense be said to be work done *on* the claims. If the proposition can be maintained, that work done in the immediate neighborhood of the claims, with the intent to work them, is equivalent to working on the claim (which we do not admit), yet it is impossible to hold that *all* work, of every sort, done at any distance from the claims, and efforts of every sort, so made, are equivalent to labor done on the claims, even if we could assign a definite meaning to the words "by relation and intendment," which qualify the principle.

We are asked to review the evidence, for the purpose of overruling the order refusing a new trial. We have looked at it, and find that it is conflicting. We do not interfere in such cases; and in no class of cases coming before us do we feel so much reluctance as we do in this class, to interfere with the verdict of the jury and the supervising discretion of the presiding judge.

There is no substantial error in the verdict and judgment. The mere fact that the verdict is entitled in the name of the plaintiff and one of the defendants is immaterial. It need not have been entitled at all.

The judgment is affirmed.

GILLAN v. HUTCHINSON ET AL.

(16 California, 154. Supreme Court, 1860.)

Right of entry on mineral lands. In the passage of the act of April 25, 1855, the legislature seems to have proceeded upon the idea that the right of a miner to enter upon the possessions of another, for mining purposes, was absolute and unconditional, and the intention clearly was

to limit the exercise of this supposed right, and not to give a right of entry in cases where no such right previously existed, and so far as it purports to give such a right, it is clearly invalid.

Compensation for taking property. The legislature has no power to take the property of one person and give it to another, nor can private property be taken even for public use, unless compensation to the owner precede or accompany the taking.

Amendment—Discretion. It is not error to refuse to allow the amendment of an answer when the defense relied upon is invalid. It is a matter of discretion, the abuse of which could alone justify interference by the appellate court.

Appeal from the Sixteenth District.

The defense relied on was, the right of miners to enter upon the inclosure of plaintiffs, under the act of 1855, for the protection of growing crops and improvements in the mining districts of the State.

The answer set up that the land was rich in minerals, that defendants had proceeded according to mining regulations, and especially according to the act of 1855, to acquire their rights. Plaintiff demurred to the answer, as insufficient in law. Demurrer sustained, and a perpetual injunction granted against defendants, the court refusing permission to amend, on the ground that the answer could not be so amended as to make it a defense to the action. Defendants appeal.

MONSON & SUNDERLAND, for appellants.

TOD ROBINSON, for respondent.

COPE, J., delivered the opinion of the court—BALDWIN, J., concurring.

This is an action to restrain the defendants from mining upon a small tract of land, containing about two acres, in the possession of the plaintiff. The land is inclosed, and employed in the cultivation of fruit trees and garden vegetables. It is situated in the mines, and the defendants threaten to enter upon it for mining purposes, having given bond in conformity with the provisions of the act of April 25, 1855, for the protection of growing crops and improvements in the mining districts of the State. The validity of this act is the only question presented by the pleadings. In the passage of

the act, the legislature seems to have proceeded upon the idea that the right of a miner to enter upon the possessions of another, for mining purposes, was absolute and unconditional, and the intention clearly was to limit the exercise of this supposed right, and not to give a right of entry in cases where no such right previously existed. It is clear that, in this respect, the legislature acted under a misapprehension of the law upon the subject. We have repeatedly held that, as a general rule, the public mineral lands of this State were open to the possession and occupancy of every person desiring, in good faith, to enter upon the same for mining purposes. But we have also held that there were exceptions to this rule, and the case at bar seems to be included in these exceptions. The correct doctrine upon this subject was laid down in the case of *Smith* v. *Doe*, decided at the January term. "It must not be understood," said the court, "that within the limits of the mines all possessory rights and all rights of property not founded upon a valid legal title, are held at the mercy and discretion of the miner. Upon this subject it is impossible to lay down any general rule, but every case must be determined upon its own particular facts. Valuable and permanent improvements, such as houses, orchards, vineyards, etc., should undoubtedly be protected, as also growing crops of every description, for these are as useful and necessary as the gold produced by the working of the mines. Improvements of this character, and such products of the soil as are the fruits of toil and labor, must be regarded as private property, and, upon every principle of legal justice, are entitled to the protection of the courts. But in all cases it must be borne in mind that, as a general rule, the public mineral lands of the State are open to the occupancy of every person who, in good faith, chooses to enter upon them for the purpose of mining; and the examples we have given may serve in some measure to indicate the proper modifications of this rule, and the restrictions necessary to be placed upon the exercise of this right. It is the duty of the courts to protect private rights of property, but it is no less their duty to secure, as far as possible, the entire freedom of the mines, and to carry out and enforce the obvious policy of the government in this respect."

The act in question, as far as it purports to give a right of

entry upon the mineral lands of this State, in cases where no such right existed anterior to its passage, is clearly invalid. The legislature has no power to take the property of one person and give it to another; nor can private property be taken even for public use, unless compensation be made to the owner, and the authorities all agree that the compensation must precede or accompany the taking.

The court did not err in refusing to allow the defendants to amend their answer. The defense upon which they relied was invalid, and we do not see how the result could have been changed by the desired amendment. Besides, the allowance of the amendment was a matter of discretion, the abuse of which could alone justify our interference.

Judgment affirmed.

SPARROW v. STRONG.

(3 Wallace, 97. U. S. Supreme Court, 1865.)

Dismissal of appeal for delay in docketing. Under rule 9 of the Supreme Court, a writ of error or appeal (based upon any judgment or decree rendered thirty days before the commencement of the term) may be docketed and dismissed on motion of the defendant in error or appellee, unless the other side dockets the cause and files the record within the first six days of the term. But if no motion to dismiss be made in the meantime, the case may be docketed and record filed at any time during term.

A mining claim has a legal money value of such a nature as to be estimated and to allow of appeal to this court, as in other cases where "the value of the property in dispute" must exceed $2,000, as the basis of jurisdiction.

[1]**National recognition.** Such claim may be a right acquired under the Mexican government; is recognized by territorial authority, and in any event has received national sanction by the acquiescence of the government in its acquirement.

Final judgment under code practice. The judgment of a Territorial Supreme Court affirming judgment below upon appeal from order denying a new trial, treated as a final judgment upon which writ of error could issue.

[1]The act of February 27, 1865, had not been passed when this suit was brought—which act is as follows: "No possessory action between individuals in any of the courts of the United States for the recovery of any min-

Sparrow brought an action in the nature of an ejectment in the District Court for the First Judicial District of Story County, Nevada Territory, to recover an interest in a mining claim, a sort of interest very common in the argentiferous territory just named.

The case was tried before a jury upon a considerable body of evidence, and a verdict having been given for the defendant, a judgment in the nature of a judgment in ejectment was regularly rendered by the court upon it.

Subsequently a motion for a new trial was made. A statement embodying all the evidence was drawn up and agreed to by counsel, and upon this statement and some affidavits tending to show surprise on the trial, and new evidence discovered after trial, the motion was argued before the district court. It was overruled and from the overruling order an appeal was taken, on the 15th November, 1862, to the Supreme Court of the Territory, under an act of the Territorial legislature authorizing such appeals.

On the 16th of March, 1863, the Supreme Court gave judgment in the cause as follows:

"On appeal from the District Court of the First Judicial District in and for Story County.

"Now on this day this cause being called, and having been argued and submitted and taken under advisement by the court, and all and singular the law and the premises being by the court here seen and fully considered, the opinion of the court herein is delivered by TURNER, C. J., (MOTT, J., concurring) to the effect that the judgment below be affirmed.

"Wherefore, it is now ordered, considered and adjudged by the court here, that the judgment and decree of the District Court of the First Judicial District in and for Story County, be and the same is affirmed with costs."

From this judgment of the Supreme Court of Nevada a writ of error was taken here; the affidavit filed being the ordinary one, that "the value of the property in dispute"

ing title or for damages to such title shall be affected by the fact that the paramount title to the land on which said mines are is in the United States, but each case shall be adjudged by the law of possession." R. S. § 910.

See also speech of Senator Stewart on the incept on of miners' titles on the Pacific slope, printed in the appendix to 3 Wallace, p. 777.

exceeds $2,000. The record did not show any bill of exceptions.

A rule of this court (the ninth) requires that when a writ of error shall be brought to it from any judgment or decree rendered thirty days before the commencement of the term—which this writ was—it shall be the duty of the plaintiff "to docket the cause and file the record thereof with the clerk of this court, within the first *six* days of the term." In the present case the writ of error was properly sued out, August 14, 1863, returnable to the next term of the court, and was regularly served. A citation was also served returnable to the same term. After the writ, citation and record were filed and the cause docketed, a motion to dismiss the case was made and argued at the last term:

1. Because the record was not filed in time by the plaintiff in error.

2. Because the interest in controversy was not capable of a money valuation; and, therefore, not of the value, within the meaning of the statute, of $1,000, the amount necessary to give jurisdiction to this court.

To understand the force or want of force of this second objection it is necessary to state, on the one hand, that the Territory of Nevada, from which the case came, was formerly part of the province of Upper California, and belonged first to Old Spain, afterward to Mexico, which was acquired by the United States only in 1848, by treaty; and that our government, as yet, had made no grants of its public lands there, or of any rights in them. Of course no one could hold anything by patent or other formal grant from this government, in which, subject to prior private rights, everything still remained vested. On the other hand, it is to be stated that in the treaty referred to it is admitted that previously to our acquisition of it, the ceded territory had been settled to some extent by the authority of pre-existing governments, and that all rights thus existing are made inviolable. In fact immense estates in California—a part of the acquired territory—rest on the titles derived from the "former governments."

Congress had also established, in March, 1861, when Nevada, previously a part of Utah, was made a Territory by itself, a government for that Territory; having a legislature with the

usual powers of these bodies in the Territories; and this legislature had acted on the development of the mines as a subject more or less within its competence.

Independently of this, however, a special kind of law—a sort of common law of the miners—the offspring of a nation's irrepressible march—lawless in some senses, yet clothed with dignity by a conception of the immense social results mingled with the fortunes of these bold investigators—had sprung up on our Pacific coast, and presented in the value of a "mining right," a novel and peculiar question of jurisdiction for this court.

The case, however, was not disposed of at the last term; nor either of the two points already mentioned passed on. It was ordered to stand over for argument on another point, the point, to wit, whether the judgment of the Supreme Court of Nevada, above referred to, was a final judgment, or decision reviewable here within the meaning of the act of Congress organizing the Territory, an act which gives this court jurisdiction to review "the final decisions" of the Supreme Court of the Territory.

Messrs. BROWNING and COPE, for the motion to dimiss, argued at the last term and at this on the three several points as follows:

1. *As to the time at which the record was filed and the cause docketed.* The language of the ninth rule is imperative. It is a general rule and as obligatory while in force as a statute. The record, confessedly, was not filed within the first six days of December term, 1863. It was therefore not filed as the rule exacts, and the writ should be dismissed on this ground.

2. *As to the value of the subject in controversy.* The affidavit which is filed in the case, declares indeed that "the property in dispute" is of the value of $2,000; a sum sufficient, we admit, to give the jurisdiction. But the matter in dispute is a "mining claim." The land in which the mine exists belongs still to the general government. It has never been surveyed nor brought into market. No pecuniary value can be attached to the possession by a claimant of anything of which the ownership is in another person. In this case the

possession is one amounting in strict law to a trespass; at best, to a tenancy at will of the government. It may be terminated at any moment. Its value depends upon the course which the government may pursue in asserting or omitting to assert its right of ownership. Whatever the occupant may hope for or even expect; whatever the government may in the benignant course of its dealings see fit hereafter to do by such a person, it is plain that he has neither right, title, interest, claim nor demand in or to the property in suit. Such an estate, or no estate, as it more truly is, can not be estimated in the sense which the law requires to give jurisdiction. Is not *Lownsdale* v. *Parish*, 21 Howard, 290, in this court much in point? There the matter in dispute was a piece of real estate in Oregon Territory which Territory then happened to be claimed by the United States and by Great Britain at once; the subjects of the two governments, occupying the region only by virtue of a treaty between the two nations. How the title might ultimately be settled, and to which government the land might finally pass, was, of course, a matter resting in speculation; dependent upon what the two governments might or might not do; just as here what the one government may or may not do. This court there held that the title to the subject of controversy was not capable of estimate in the sense required by law to give jurisdiction to this court.

III. *On the last point—the point on which the case stands over*—"*Is the judgment a final one?*" However the matter may be disguised, or the mind misled by the technical words, "judgment," "decree," etc., and the old-fashioned formula of "seen," "fully considered," etc., used in the record, it is obvious that the judgment or decree which has been affirmed, is but the judgment and decree ordering a new trial; nothing else. In other words, that the terms "judgment" and "decree," are, in Nevada Territory and under its peculiar system of law—which makes the granting or refusal of a new trial the subject of review in an appellate court—applied to the affirmance of the order of the district court, overruling the motion for a new trial. It is not worth while to be so lost in the *technique* of the law—in the verbality of clerical

"entries," as to forget "that words are the daughters of earth, and things the sons of Heaven:"

It seems that there was no "assignment of errors." The judgment was probably affirmed for want of one. But as the record stands, this court rests in ignorance of the ground on which the judgment proceeded; and the case stands here simply as a writ of error to bring before this court for revision, the decision of the Supreme Court of Nevada, upon a motion for a new trial. Need we say that this tribunal will not review decisions on points resting purely in the discretion of the court below? It was but at the last term that this court declared, with what seemed to be a special emphasis, and a warning not to bring such cases here, that "its decision has always been the granting or refusal of a new trial is a matter it can not review."

Messrs. O'CONNOR & BILLINGS, *contra.*

The CHIEF JUSTICE now delivered the opinion of the court on all three of the points.

The first ground taken in favor of dismissing the writ of error, to wit, that the record was not filed in time by the plaintiff in error, is untenable. The writ was regularly sued out on the 14th of August, 1863, returnable at the next term of court thereafter, and was duly served; a citation was also issued and served, returnable at the same term; and the writ and citation, with the record, were returned here and filed, and the cause docketed before the motion to dismiss. It has been repeatedly held that, in such a case, no motion to dismiss, under the ninth rule, can be entertained.

Nor do we think that the appeal should be dismissed for the second reason assigned by the defendant in error, namely, that the subject of controversy is not of the jurisdictional value. It is insisted that the matter in dispute is a mining-claim; that the land where the mine exists has never been surveyed and brought into market; and that, consequently, there can be no mining right to such land in any person, capable of being estimated in money.

It is true that in the case of *Lownsdale* v. *Parish*, this court held that an obstruction to the enjoyment of land

claimed under a law or regulation of a convention in Oregon, held without the sanction of the United States, and during the joint occupation of that country by Great Britain and the United States, was not an injury capable of being so valued as to give jurisdiction to this court; nor, indeed, an injury of which the courts of the United States could take cognizance at all. But that decision was put distinctly on the ground that Congress, when it came to act on the organization of Oregon, expressly declared that all laws theretofore passed in that Territory, making grants of lands or otherwise affecting or incumbering the title to lands, should be and were thereby declared "null and void."

The claim which the court was asked to protect, was asserted under a law thus declared null and void by the highest legislative authority. It was for this reason that the court refused to take jurisdiction in *Lownsdale* v. *Parish*, and dismissed the appeal.

The writ of error now before us relates to a very different subject of controversy. The territory, of which Nevada is part, was acquired by treaty. Rights and titles acquired under ceding governments remain unimpaired under our government. We can not know judicially, therefore, that the right and title in controversy was not so acquired. If it was it certainly may be capable of being valued in money.

But if this were otherwise, we do not know that in the act organizing the Territory of Nevada, there is no clause annulling grants or claims to land, while large legislative powers are conferred by the Territorial legislature, limited only, as to lands, by the prohibition of interference with the primary disposal of the soil by the United States, and of unequal taxation in certain cases. We know, also, that the Territorial legislature has recognized by statute the validity and binding force of the rules, regulations and customs of the mining districts. And we can not shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country.

We can not dismiss this writ of error, therefore, on the

ground that a controversy concerning the possessory right to a mining claim, existing under the express sanction of the Territorial legislature and the implied sanction of the national government, does not relate to a subject-matter capable of being valued in money.

As the questions, thus far considered, were argued at the last term, the motion would have been then disposed of had not doubts been excited by an inspection of the record, upon the point for the argument of which the motion was ordered to stand over.

It is insisted, on this point, that the judgment is merely an affirmance of the order of the district court overruling the motion for new trial. If this be so, the judgment itself is, in substance and effect, nothing more; and it is settled that this court will not review such an order. The granting or refusing of new trials is a matter of discretion, with the exercise of which, by the court below, this court will not interfere. The circumstance that the discretion was exercised under a peculiar statute by an appellate court, and on appeal, can not withdraw the case from the operation of the principles which control this court.

But the majority of the court does not feel at liberty to disregard the plain import of the terms of the judgment rendered by the Supreme Court of the Territory. It does not purport to be an order or judgment affirming an order overruling a motion for new trial, but a judgment affirming the judgment or decree of the district court, and the only judgment or decree which we find in the record, is the judgment for the defendants in the action of ejectment.

If this view be correct, the judgment of the Supreme Court is one to review which a writ of error may be prosecuted. And the record shows that the writ has been regularly sued out and returned. This court therefore has jurisdiction, and it has been repeatedly held in similar cases, that on a motion to dismiss, the court will look to the regularity of the writ and the fact of jurisdiction. Other questions must, in general, await final hearing.

Motion to dismiss overruled.

ATKINS ET AL. v. HENDREE ET AL.

([1] 1 Idaho, 107. Supreme Court, 1867.)

Requisites to location. The Territorial law requires, to perfect a location, the staking of the claim, a location notice and a record, and the performance of $100 worth of labor within one year.

Entire year allowed for labor. If all these things had been done except the labor, and the year in which to do the labor had not expired, strangers entering the ground become trespassers.

Abandonment—Separate veins. Defendants in ejectment may show abandonment or they may show that the lode they entered upon was a separate vein.

Surface—Claim confined to single vein. The locator is confined to only a single vein, but a later party can not enter into his lines to prospect for a second vein. The locator is entitled to the surface, and the second vein must be proved to exist within the lines of the first before any later locator can enter between the boundaries of the first claim.

Mistake in staking off feet. A claim staked beyond the legal length is void for the excess; but the error does not nullify the entire claim.

Ejectment for a mining claim.

Plaintiffs claim to have located some time in the month of March, 1866, a quartz lode, which they denominated the "First extension south of the Dahlgren." This claim consisted of two hundred feet in length with the width allowed by law. They performed no work or labor upon this claim, except staking it off, up to the time of defendants' entry, which was about the 7th of September, 1866. Defendants located a set of claims running at nearly right angles across the line of plaintiffs' location, under the name of the "Silver Monarch." Their discovery shaft on the point where they claimed to have discovered the lode they located, and the only point where they had performed any considerable amount of labor or pretend to have found the lode at all, was within a few feet of the line between the stakes of the plaintiffs' location, but they claim that their ledge is a separate one from that claimed by the plaintiffs.

Trial by jury, and verdict for the defendants. Plaintiffs move to set aside the verdict and for a new trial.

The hearing of this motion was adjourned into the Supreme Court under section 326 of the Civil Practice Act.

[1] Page 95 of 1 Idaho, New Series.

H. MARTIN, attorney for the plaintiffs.

On motion for a new trial, and in weighing testimony, if it is found that the testimony fails to establish an essential fact in question, then new trial must be granted: *Hawkins* v. *Reichert*.28 Cal. 539; *Bolton* v. *Stewart*, 29 Cal. 618.

Where improper evidence is admitted injury is presumed, unless such presumption is rebutted by the record: *Lally* v. *Wise*, 28 Cal. 543; *Grimes* v. *Fall*, 15 Cal. 63.

STAFFORD & MCQUAID, attorneys for defendants.

No brief on file.

MCBRIDE, C. J., delivered the opinion of the court—KELLY, J., concurring.

This is an action brought to recover a piece of mining ground containing a quartz lode, which the plaintiffs claim to have located and held under the Quartz Law, until they were turned out of the possession and ownership by the wrongful acts of the defendants. The action is ejectment in the usual form under the code, and the issue is as to the plaintiffs' possession at the time of the alleged ouster. The defendants admit that they entered upon the premises in question, but allege that the same were vacant, and open to claim and location at the time; and the acts of the plaintiffs were entirely insufficient to establish any legal right or possession to the same. On issue joined before the jury there were discussed, as appears by the record and the instructions of the court, these questions:

First. Did the plaintiffs comply witth he requirements of the Quartz Law in the location of their claim? and if so,

Second. Were the plaintiffs the owners at the time of the entry of defendants upon the premises?

The verdict was general, and was for the defendants. Plaintiffs filed certain exceptions to the ruling of the court in its instructions to the jury, and on motion for a new trial urged those exceptions, and that the finding of the jury was in disregard of the testimony as grounds for setting aside the verdict, and ordering a new trial. The court below ad-

journed the case into this court for decision, and the question is upon the motion of the plaintiffs to vacate the verdict of the jury and the award of a new trial.

The principal questions involved in this case are such as arise upon the construction to be given to the Quartz Law.

The plaintiffs also complain of misconduct on the part of one of the jurors, but we think there is nothing which indicates corruption or willful wrong by the juror whose conduct is impeached, and that the charge, though quite natural at the close of a hotly contested trial, where the parties felt a deep interest in the result, is not sufficient to warrant the conclusion which the appellants draw from the facts. That portion of the case we dismiss from our consideration.

The ground upon which the plaintiffs except to the instruction of the court to the jury as being upon a supposititous state of facts, we think not sustained by an examination of the record, and we will scrutinize the objections to those instructions on the basis of their merits as expositions of law. Whether a given instruction can have any application to the case undergoing a trial will always be more properly determined by a judge, who hears all the testimony, than by an appellate court which has at least but a meager outline of the evidence before it. On such questions we would require a clear case of objectionable application of the law, before we would disturb a verdict. The Quartz Law requires, in order that a party shall have the benefit of its provisions in acquiring title to mining ground, that he shall stake off the ground, and if, as in this case, it is a single claim, there shall be a stake of a certain size driven at each end of the claim, that he shall post a notice containing certain requisites on said stakes, that within the time limited he shall have the same recorded in the proper office, and that all these acts being performed, he shall be entitled to hold the ground so designated as real estate, upon the condition that within one year he shall perform one hundred dollars worth of labor in the development of the same.

Now, if the plaintiffs performed these acts as required by law, except the labor, and the year had not expired within which this was to be done, and the defendants undertook to take possession of the ground, they were trespassers, and the

plaintiffs are entitled to their remedy to recover possession. If the defendants can show some act of abandonment on the part of the plaintiffs, of the lode which they claim is separate and distinct from the one held by the plaintiffs, then they may by such showing defeat the plaintiffs' right to recover.

And in reference to the right of a locator of a claim to his ground, we think that for the space of two hundred feet in length and of fifty feet in width on each side of his stakes, from the time that a lawful location has been made he becomes the owner as against any other claimant of the soil embraced within those limits. It is true that the law allows him to hold only one lode by this location, but the fact that two ledges exist within these bounds must first be established before the subsequent claimant has any lawful right to pass into them.

If by going outside of these boundaries and tracing it into them he shows that another and distinct lode exists, then he may pass boundaries that would otherwise be sacred to the first locator. But until he does so, he has no right to go upon the ground which the law has already given to his neighbor.

What can be the use of the law which requires a party to stake out and define the bounds of his claim, if those bounds are not to be respected, and are to be treated for the purpose of prospecting, the same as any other vacant ground? It seems by the evidence contained in the record that if any ledge such as the Silver Monarch exists, or has been discovered, it is within the limits of the claim of the plaintiffs. The shaft of the ledge of the defendants is within a few feet of a line drawn between the plaintiffs' stakes, and no work has been done on the Silver Monarch claim outside of the boundaries of the Atkins claim on the Dahlgren. No lode was found outside and traced into those limits, but defendants enter upon the premises claimed by the plaintiffs six months after they had been attempted to be appropriated by the plaintiffs, and discovering what they call a new ledge, insist upon their right to hold it in defiance of the plaintiffs' claim.

This can not be allowed if the plaintiffs had any legal claim. If their location was lawful, and complied with the requirements of the statute, then the defendants were trespassers at the time of their entry. Hence, the question now is, whether

the plaintiffs complied with the law in reference to the location of quartz claims so far as to vest the right of ownership in these premises in the plaintiffs, when the defendants made their entry, and did the jury disregard the law and the facts in rendering their verdict. In this connection we will observe that we think the court erred in giving the instruction No. 2 asked by defendants, to the jury. That instruction was as follows:

"No quartz claim can exceed two hundred feet in length along the lead or lode, and if the jury believe from the evidence that the claim of plaintiff Atkins was purposely located to include a greater number of feet than two hundred, then the location is an attempted fraud upon the provisions of the law and the rights of others, and the location is null and void as against subsequent locators of the same ground, and is liable to subsequent location, and the jury must find for defendants."

We do not assent to this view of the law. The provisions of the law require that the claimant should define the claim by stakes, two hundred feet apart; that he should designate which is the beginning point in his notice and give the direction, distance, etc. If he claims more than the law allows, it is void for the excess; but the notice does not claim all the ground between the stakes, but two hundred feet of ground running in a given direction from the place of commencement. To claim more than the law allows is no fraud on others, for they have the same means of ascertaining the attempted fraud that the other has to commit it. They can measure the ground and confine him to the limits prescribed by law, but to say that he shall lose his claim entirely because he may have included more than he can hold within his stakes by a few feet, or by ever so much as to give protection to parties, subsequent claimants, who are not so likely to need it as the prior locator, is to be protected in his rights.

If he has too much, it is easy to discover it; and all the benefit that a subsequent locator can claim is that he shall be entitled to maintain his right to the excess.

We therefore proceed to inquire whether, by the testimony, the plaintiffs show a legal location of the ground.

Garlick was the man who made the location; and the testimony is that he was authorized by Atkins, the claimant, to

locate for him; that using the south stake of the discovery claim of the "Dahlgren," of which he was the discoverer, he posted the notice of the claim; that he also planted another stake about two hundred feet south of this, on the same day and that on this stake a notice, similar to the first, was posted, claiming the two hundred feet of said lode described in them; and that afterward the notice was recorded, and the oath of the claimant filed with the recorder, as required by law.

These are facts which the defendants seem not seriously to have attempted to contest. That the defendants were advised of the plaintiffs' claim is clear, from the fact of their offer to purchase; and that in the original location the law was substantially complied with, is too clear for reasonable dispute. The pretense that Atkins forfeited his claim because he may have included more than he could hold between his stakes, we have already disposed of; and unless the defendants can show that there was an abandonment of the claim of the plaintiff, Atkins, prior to their entry, they were clearly trespassers upon his rights. Is there anything in this testimony that justifies the assumption of abandonment? We fail to see it. The only testimony bearing on the question was that referring to the negotiations for a purchase of his claim. Whatever loose conversation Atkins may have indulged in on that occasion, the fact remains that the defendants offered to buy, and that he declined to sell them his claim; and how this fact can be construed into an abandonment of it we do not comprehend.

We conclude, therefore, that at the time the defendants entered upon the premises they were lawfully held and owned by the plaintiffs; that the claim that the Silver Monarch is a distinct lode, is one that gives the defendants no right to enter bounds of the Atkins claim unless that fact was first established; and that the verdict in this case is in defiance of both law and the facts. Whether we suppose the jury to have found that there was no location, or that the manner of it was a fraud, or that it had been abandoned by Atkins, one or all of which they must have done to reach such a verdict, it matters not; it is unsupported, and must be set aside.

We are of the opinion that a new trial should be had, and for that purpose return the case to the district court, with a mandate accordingly.

SPENCER AND PRATT v. WINSELMAN AND CLOW.

(42 California, 479. Supreme Court, 1871.)

Tenure of mineral lands. A statute of Cal. Pr. Act, § 380, provides in substance that any controversy which might be the subject of a civil action, may be submitted to arbitration "except a question of title to real property in fee or for life." *Held*, that under this statute an action for the recovery of mining ground on the public domain could not be submitted to arbitration.

Appeal from the District Court of Yuba County, Tenth Judicial District.

While this cause was pending in the court below the parties agreed to submit it to arbitration. The award and judgment was in favor of plaintiff for the possession of the mining claims in controversy situate at Youngs Hill, in Yuba County, together with $1,600 damages, for gold extracted and taken away by defendants. Defendants moved to set aside and vacate the award and judgment, which motion being sustained, plaintiffs appealed.

W. C. BELCHER, J. O. GOODWIN and GEORGE MAY, for appellants.

HATCH & ASHFORD, J. L. LOCKWOOD and P. VAN CLIEF for respondents.

By the Court, WALLACE, J.

Spencer and another brought an action against Winselman and others for the recovery of certain mining grounds, alleging themselves to be owners and entitled to the possession of the premises sued for. The defendants answered, denying the ownership of the plaintiffs, and alleging themselves to be the owners, and entitled to the possession of the premises. While the cause was pending upon these issues, the parties stipulated in writing to submit the cause to arbitration, and the stipulation was entered as an order of court pursuant to the statute: Practice Act, Sec. 382.

An award having subsequently been made, and judgment entered in the judgment book pursuant to the statute, the

defendants moved to vacate it upon several grounds, and, among others, upon the ground "that the matters, issues, and questions submitted to arbitration by said agreement and actually submitted to said arbitrators by the parties, involved questions of title to real property in fee and for life," etc. The motion having been sustained, this appeal is taken.

The statute (Pr. Act, Sec. 380,) provides, in substance, that any controversy which might be the subject of a civil action, may be submitted to arbitration, "except a question of title to real property in fee or for life."

In *Merritt* v. *Judd*, 14 Cal. 61, the question was before this court as to the nature of the tenure by which mineral lands in this State were held. It was urged in argument, that the occupant of a mining claim is not thereby the owner of a freehold estate in the premises, and not being such owner had, consequently, no right to the fixtures there in controversy, but that the Federal Government is the owner of the soil. But the court said: "From an early period of our State jurisprudence we have regarded these claims to public mineral lands as titles. They are so practically. * * * Our courts have given them the recognition of legal estates of freehold; and so, to all practical purposes, if we except some doctrine of abandonment, not, perhaps, applicable to such estates, unquestionably they are; and we think it would not be in harmony with the general judicial system to deny to them the incidents of freehold estates in respect to this matter."

In *Hughes* v. *Devlin*, 23 Cal. 501, the question again came before this court in an action for a partition, and, in speaking of the tenure by which such property is held in this State, the court said: "Although the ultimate fee in our public mineral lands is vested in the United States, yet, as between individuals, all transactions, and all rights, interests, and estates in the mines are treated as being an estate in fee, and as a distinct and vested right of property in the claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine. They are treated, as between themselves and all persons but the United States, as the owners of the land and the mines therein," etc.

The case of *Blair* v. *Wallace*, 21 Cal. 318, relied upon by the appellant, is not in conflict with these views. The controversy there grew out of a contract between the parties, and did not involve a question of title in the sense of the statute prohibiting its submission to arbitration. It is not doubted that a party who is the admitted owner of a title in fee to real estate may contract to convey it to another, and that a controversy concerning the alleged performance or non-performance of such a contract may be the subject of arbitration under the statute; and this seems to have been the nature of the controversy submitted to arbitration in the case of *Blair* v. *Wallace*.

Order affirmed.

CORREA v. FRIETAS ET AL.

(42 California, 339. Supreme Court, 1871.)

Evidence—Mining claims—Flume. F. owned certain mining claims with a tail flume thereon for working the claims. C., who owned claims below F., commenced to construct a ditch below the lower end of F.'s flume but upon F.'s claims, for the purpose of appropriating the water from F.'s flume to be used in working C.'s claims. F. extended the flume, still keeping in his own claims, so that the water from the flume could not be turned into C.'s ditch. Upon suit brought by C. to abate the extension of F.'s flume as a nuisance it was *held*, that evidence which tended to prove that the portion of F.'s claims through which C.'s ditch was cut was worthless for mining purposes, and also that the extension of F.'s flume was not beneficial to the working of his claims was improperly admitted.

Appropriation. The instruction that if C. was the owner of a mining claim on the same ravine, but below F., he had a right to use the natural waters of the ravine for the purpose of working his claim, and could lawfully construct a ditch upon F.'s mining ground for that purpose, provided it did not interfere with F. in the perfect enjoyment of the ground for mining purposes, that one person might appropriate public mineral and for mining purposes and another party use the same for a different purpose, provided the different uses did not conflict, *held*, to be erroneous.

Appeal from the District Court of Placer County, Fourteenth Judicial District.

Correa complained that the extension of a certain flume near the town of Newcastle in Placer County was constructed by defendants to annoy and injure him and prayed that it might be abated as a nuisance and for damages.

The answer denied that the extension was a nuisance, but averred that defendants owned the claim wherever the extension was built, and that it was a proper and necessary means of working their claim. Trial by jury and verdict for plaintiff for $100 damages. Judgment for $100 and direction to sheriff to remove the extension as a nuisance. Defendants appealed.

T. B. MCFARLAND and E. L. CRAIG, for appellants.

FELLOWS & NORTON, for respondent.

By the Court, TEMPLE, J.

The defendants were the owners and in possession of certain mining claims situate on Dutch Ravine, including the bed and banks of the ravine. They worked their claims by the hydraulic process, and had leading down the ravine a tail flume, used for carrying off their tailings and water, and for collecting and saving their gold. While the defendants were working their claims in this manner, the plaintiff, who owned mining claims below the defendants, commenced the construction of a ditch below the lower end of defendants' flume, but upon the mining claims of defendants, for the purpose of appropriating the water discharged from the defendants' flume for his own use in working his claim. The water used by defendants consisted of the natural water of the ravine, and other water purchased by them from a ditch company.

About the time plaintiff's ditch was completed, but before water had been turned into it, defendants extended their flume to a point on the ravine below plaintiff's ditch, so that it was impossible for plaintiff to turn the water into his ditch. The terminus of the flume, as extended, is still upon the mining claims of the defendants.

It is claimed that the extension of the defendants' flume could serve no useful purpose, and was done maliciously to

deprive plaintiff of the use of the water; and this suit is brought to abate it (the extended portion) as a nuisance.

The evidence upon the trial was conflicting upon the question whether the extension to the ditch was advantageous to defendants in working their claims, and upon the question whether the maintenance of the plaintiff's ditch would interfere with the flow of water and tailings from the defendants' flume. The evidence tended to prove that the portion of defendants' claims through which plaintiff's ditch was cut was worthless for mining purposes. This evidence was admitted against the objections of defendants' counsel, as was evidence which tended to show that the extension of defendants' flume was not beneficial to the working of their claims.

The defendants asked the court to instruct the jury that "the owner and possessor of a mining claim on the public domain has a right to prevent any subsequent comer from erecting or constructing any superstructure, cut, or ditch, on his claim, unless the right to construct the same is given by some mining custom or regulation." This instruction was refused, but the court instructed the jury, in effect, that if the plaintiff was the owner of a mining claim on the same ravine, below the defendants, he had a right to use the natural waters of the ravine for the purpose of working his claim; that he could lawfully construct a ditch upon the mining ground of the defendants for that purpose, provided he in nowise obstructed or interfered with the defendants in the proper working of their mining ground, nor in their perfect enjoyment of the same for mining purposes; that one person might appropriate public mineral land for mining purposes, and another party use the same for a different purpose, provided the different uses did not conflict.

These rulings and instructions are assigned as error, upon an appeal from the judgment on the part of defendants.

Ordinarily, when one takes possession of land he is presumed to appropriate it for all purposes. Thus, when one takes possession of a tract for farming purposes, and incloses it, it would not be competent for another to show his right to dig for coal upon it by proving that he does not interfere with the possession necessary for farming purposes on the part of the farmer. Very frequently, however, possession is

taken of land for purposes purely temporary, and under circumstances which do not indicate a claim of ownership. Of such a character, doubtless, is the claim of the locator of a mining claim. The possession itself is generally constructive as to a large portion of the mining ground, and is established by the rules and regulations of the district, or by the custom of miners.

The character of the possession necessary to work mining claims will vary with the nature of the mines, the mode adopted in working them, and, perhaps, with the character of the country. Mining claims are limited in extent; and it must be presumed that it was not intended that the first locator should prevent the working of contiguous claims further than is necessary. At the same time he ought not to be controlled in the mode he may wish to adopt in working his claim further than is necessary for the common good. The rights which the owner of one claim will require with reference to other claims differ with the locality and the character of the claims, and are usually regulated by mining rules or local mining customs. Some mining customs of a general nature, which have been repeatedly recognized by judicial decisions, may be said to have become a part of the common law of the land; but I know of no such general custom upon the point involved in this case.

Upon general principles the fact that the possession of the defendants was a qualified possession, taken for a specific purpose, would not justify the intrusion of the plaintiff. The flume was extended for the avowed reason that it was necessary to enable the defendants to work their claims to advantage. In the absence of some custom which would restrict their right of possession, they ought not to be deprived of that right, because another may be able to convince a jury that such extension is really not beneficial to the working of their mine. If this could be done, another might deprive them of a portion which was still left, and they would not be able to work their claim according to their own judgment, but might be compelled to vary their operations to suit the whims of witnesses and jurors.

The evidence that the ground was not valuable for mining purposes could not be admissible, on general principles, to

prove that defendants had no right to hold it. If the title to mining ground could be defeated by such evidence, no claim which was not paying could be considered secure. If parties are allowed by the mining regulations to include within their claims land outside of that which they expect to work, we must suppose, in the absence of proof to the contrary, that it is for the convenience of working the claims, and that its possession is necessary. The evidence was, therefore, improperly admitted, and the instructions given were erroneous.

Judgment reversed, and cause remanded for a new trial.

CROCKETT, J., dissenting.

I dissent.

HOUTZ ET AL. v. GISBORN ET AL.

(1 Utah, 173. Supreme Court, 1874.)

Parties to an action. Persons owning no interest in the property in controversy, and having no interest in the event of a suit, are not necessary or proper parties thereto.

Practice Act governs all actions, both in law and equity. The practice, pleadings, forms and modes of proceedings of the courts in this Territory, were intended by Congress to be left to the legislative action of the Territorial legislature. Since the adoption of the Code of Procedure in Utah there does not exist any such thing as a chancery proceeding separate and distinct from a legal proceeding. The code applies and governs all pleadings, modes and forms, both at law and equity.

Mining claims, real estate. Mining claims are real property and pass by deed.

Surplusage in pleading. Where a complaint taken as a whole states a good cause of action, unnecessary statements and allegations may be regarded as surplusage.

Appearance waives process. A general appearance waives any informality as to the process upon which parties are brought into court.

Order to bring in other parties. The court may, under section 17 of the Practice Act, order any other parties to be brought in if it can not determine the case in his absence.

Appeal from the Third Judicial District.

The facts appear in the opinion of the court.

MARSHAL & ROYLE, for appellants.

ROSBOROUGH & MERRITT and HEMPSTEAD & KIRKPATRICK, for respondents.

EMERSON, J., delivered the opinion of the court.

The appellants in this cause aver in their complaint, that they, together with one William Clark, are the owners of a mining claim, known as the Shoo Fly Lode Westerly, in Ophir Mining District in Tooele County, in this Territory, and also aver a full and complete compliance upon their part with all the laws, local rules and regulations respecting mining property, and averring and setting up a complete possessory right in themselves and said Clark.

The complaint sets out the discovery and location of said claim, and the appellants' claim of title from the locators, but alleges that one of the deeds under which they claim, and a copy of which is filed with the complaint, is void for uncertainty and ambiguity, in not definitely stating who are the parties of the first part to that conveyance, and the contract under which that deed was given is set out in full, in order, as is alleged by appellants, to show an equitable interest arising to them from said contract, and an agreement to convey. The complaint further avers that the respondents have applied for a patent from the general government, for certain mining ground and property, called by them the Mono Lode, situated in said district, and that by the survey of said Mono Lode, filed with said application, it is made to conflict with and cover certain portions of said Shoo Fly Lode Westerly, and that the appellants, on the 31st day of December, A. D. 1872, filed in the Land Office, where said application was pending, a protest and notice of adverse claim, and were in return served by the Register of the Land Office with a notice to commence suit in some court of competent jurisdiction, to settle said adverse claim, within thirty days from the date of filing said notice and protest. The appellants filed their bill of complaint on the 30th day of January, A. D. 1873, upon what was termed the *chancery* side of the Third Dis-

trict Court; a subpoena was issued and served, and all of the respondents appeared in the case. A demurrer was filed on the part of the respondents, the principal ground of which was the want of jurisdiction in a court of chancery to determine the case made by the complaint, and claiming that there was a plain and adequate remedy at law under the statute. Another ground of demurrer was the non-joinder of Clark, and the failure on the part of the appellants to make the grantors in the deed before mentioned parties to the suit.

The demurrer was sustained by the court below and the bill dismissed, and from that judgment the appellants appeal to this court.

Upon an examination of the certified copy of the deed contained in the record, we are satisfied that it is not liable to the objection made to it by the appellants in their bill. If there is any ambiguity or uncertainty in the designation of the parties of the first part in the commencement of the deed, it is rendered entirely unambiguous and certain as to who those parties are by the attestation clause, and execution.

The grantors named in and who executed that deed have no interest in the premises in controversy in this suit, neither have they any interest to be in any way affected by this proceeding, and they should not be parties to it so far as is disclosed by the complaint.

The Civil Practice Act, adopted by the Territorial Assembly in 1870, abolished the distinction between legal and equitable remedies, and enacts "that there shall be in this Territory but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs."

The Supreme Court of the United States in the case of *Orchard* v. *Hughes*, 1 Wall. 77, decided that the Territorial Courts were subject to the same general regulations in equity cases which govern the practice in the United States Circuit and District Courts; that is, equitable remedies must be pursued under the chancery rules prescribed by that court.

In a very recent case the United States Supreme Court has reversed its former decision, and has given full force and effect to the Territorial statute allowing a commingling of legal and

equitable remedies. In effect this last decision establishes the fact that in this Territory there is not now, and has not been since the adoption of the Code of Procedure, any such thing as a chancery proceeding separate and distinct from a legal proceeding. And no matter whether the relief sought be purely legal or purely equitable, the form of the complaint is left in a great measure to the judgment of the pleader, stating the whole of the plaintiffs' cause of action, and demanding such relief as he may deem himself entitled to under the case made by the complaint.

By a law of the Territory those mining claims are real property and pass by deed, although the legal title is in the government. These appellants, who were the plaintiffs below, claim that they are in possession of the premises in controversy. A statute of the Territory gives such parties a right of action against any person who claims an estate or interest adverse to them, for the purpose of determining such adverse claim, estate or interest.

In order to preserve their rights the appellants were compelled to bring this suit within thirty days from the date of filing their protest and notice of adverse claim; that time had nearly expired when this suit was commenced, and this was before the recent decision of the United States Supreme Court in relation to the practice under the Code of Procedure in the Territories.

The complaint purports to be a bill to remove and quiet certain claims set up against the appellants' rights, and though containing allegations necessary and proper in a bill in chancery to quiet title, is in fact and effect a complaint framed for the purpose of determining a claim or interest in real estate adverse to the appellants, and may be regarded as stating their whole cause of action, and therefore proper and sufficient under the code.

There may be statements and allegations in it which would not be strictly necessary under the code; these unnecessary statements and allegations may be regarded as surplusage, and their presence would not be a good ground of demurrer, if the complaint, on the whole, stated facts sufficient to constitute a cause of action, and we think it does.

As there was a general appearance on the part of all of the

defendants, any informality as to the process upon which they were brought into court is waived. We see no objection to the case proceeding under the code.

If the court below is satisfied that it can not determine the controversy between the parties before it without prejudice to the rights of Clark, and that a complete determination of the controversy can not be had without his presence, we are of the opinion that under the broad power given to the court by sections 14, 17 and 68 of the code, proceedings may then be had to bring him into court. For the reason that there are, doubtless, many cases now pending in the District Courts in this Territory commenced under somewhat similar circumstances as this, we are desirous of establishing some consistent and legal rule to govern those courts in disposing of that class of cases. We think the rule adopted in this case is such a rule, and will result in saving to parties valuable rights, which would otherwise be lost to them from following a decision of the highest judicial tribunal in the land, a decision which that tribunal has now decided was erroneous.

The judgment of the court below in sustaining the demurrer is reversed; the demurrer is overruled and the defendants to have twenty days to answer after notice served upon them or their attorneys of the filing of the remittitur in the Third District Court.

McKEAN, C. J., and BOREMAN, J., concurred.

1. Mining claim defined: *Mt. Diablo Co.* v. *Callison*, 5 Saw. 439; *Post* LODE.

2. The right to occupy the public lands is allowed to all classes of settlers; the right to mine can not be exercised against a prior appropriation for mill purposes: *Tartar* v. *Spring Creek Co.*, 5 Cal. 395; *Post* TIMBER. Nor against a lot occupied for hotel purposes: *Fitzgerald* v. *Urton*, Id. 308; *Post* POSSESSION.

3. As to the rights of mining claimants as against agricultural claimants, see *Burdge* v. *Underwood*, 6 Cal. 45: *Post* DITCH; *McClintock* v. *Bryden*, 5 Cal. 97; *Post* PUBLIC DOMAIN. See note 1 M. R. 496.

4. Loose quartz detached from the ledge, but close to and traceable to it, is part of the claim: *Brown* v. *Forty-nine Co.*, 15 Cal. 152; *Post* LODE.

5. A lode claim may extend beyond its surface lines on the dip of the vein: *Iron Co.* v. *Murphy*, 1 M. R. 548.

6. "Bank" and "creek" claims distinguished: *Chapman* v. *Toy Long*, 1 M. R. 497.

7. The owner of a lode claim has a taxable interest: *Forbes* v. *Gracey*,

94 U. S. 762; *Post* TAX; *State* v. *Moore*, 12 Cal. 56; *Post* TAX; *People* v. *Shearer*, 30 Cal. 645; *Post* TAX.

8. A claim, or possessory title, is sufficient upon which to base a bill to quiet title: *Prahs* v. *Pacific Co.*, 35 Cal. 30; *Post* QUIETING TITLE.

9. Contract for deed of mining *claims* construed not to imply a warranty, but a mere conveyance of the miner's title: *Corbett* v. *Berryhill*, 29 Iowa, 157; *Post* VENDOR AND PURCHASER.

MERRIMACK MANUFACTURING COMPANY v. QUINTARD ET AL.

(107 Massachusetts, 127. Supreme Court, 1871.)

Breach of contract—Waiver. In suit upon a coal contract for damages on account of the inferior quality of the coal delivered, and the failure to deliver within the time named in the contract, the defendants insisted that both claims were waived; the evidence was conflicting. *Held*, that the question of waiver was properly left to the jury.

Measure of damages. Upon a contract to deliver coal at the plaintiffs' factory at a fixed price, the measure of damages for delivering an inferior quality of coal is the difference in value, at the factory, of the coal called for in the contract and that actually delivered; and since the coal was to be transported at plaintiffs' expense, the measure of damages for a failure to deliver at the time called for in the contract, the plaintiffs having consented to receive it later, was the difference between the actual charge for freight and insurance and the average rates during the period covered by the contract.

Evidence. Testimony that freights were usually higher in autumn than in summer, upon suit for damages for delay in delivering coal, is clearly competent.

This was an action to recover damages for breach of a coal contract dated February 29, 1870, the provisions of which were as follows:

"The parties of the first part (defendants) agree to sell the parties of the second part (plaintiffs) 14,000 tons of the Preston and Gilberton Locust Mountain Coal, deliverable from April 1 to September 1, current year, on board vessels at Philadelphia, in equal monthly proportions, as nearly as may be, at the price of $3.50 per ton of 2,240 pounds, free on board, payable in cash. If the parties of the first part be interrupted in the delivery of the above coal during the time specified, viz.: April 1, and September 1, current year, by strikes or any unforeseen causes, additional time will be allowed them to complete the delivery of the same, not exceeding one month. Bills of lading shall be *prima facie* proof of delivery in regard to time and quality, and the coal when on board is to be at the risk of the parties of the second part. The parties of the first part agree to use their best exertions in procuring vessels at as low rates of freight as possible for

the parties of the second part, and are to attend to the shipping of the coal without charge. Bills of lading are to be made to the treasurer of the parties of the second part, either to the Boston & Lowell railroad wharf in Boston, or to Phillips Wharf in Salem, so as to be conveniently delivered to the cars at either place, as customary, as the parties of the second part may direct. The parties of the second part agree to purchase and to receive the above coal as above described and specified, and to pay for the same as mentioned above, provided the first cargo, which shall be shipped by the parties of the first part as early as navigation will permit, as a sample cargo of the coal, shall prove satisfactory to the parties of the second part; a reasonable time to be allowed for testing the same; if not satisfactory, then this agreement to be void."

The breach alleged was, that a portion of the coal delivered was inferior to the alleged sample, and that another portion was not delivered at the specified time.

At the trial in this court before AMES, J., the execution of the agreement was admitted, and it appeared "that the sample cargo was received by the plaintiffs," who are a manufacturing corporation, "at Lowell, in April, 1868, and that seven or eight cargoes, in about a month afterward, were landed at Boston and Salem and forwarded to the plaintiffs' works at Lowell;" and there was evidence tending to show "that the quality of the coal making up these cargoes proved on trial at the plaintiffs' works at Lowell to be inferior to the sample; that they objected to it, and notified the defendants that no more of that kind would be received, and that the delivery at Philadelphia of a large portion of the coal did not take place till after October 1, whereby the plaintiffs were obliged to pay higher prices for freights and insurance." There was conflicting evidence upon the question, "whether the plaintiffs agreed to waive all objection to the quality of the coal so complained of, provided the remainder should be such as the contract required, or whether that matter was merely reserved for adjustment on final settlement."

"In order to show what increase there had been in freights and insurance resulting from the delay in delivery, the plaintiffs were permitted to show what had been the actual ex-

pense to them, under these heads, upon the coal shipped within the period limited by the contract, and what had been the actual expense for the same items on the coal shipped after that time; also to show the number of tons received within the period limited by the contract, and the average rate of freight on each ton, and the same things as to that portion of the coal that was shipped after that period, and also the increase in the cost of insurance. The treasurer of the plaintiffs, who testified that he had been long in the practice of buying and receiving coal from Philadelphia, was permitted to testify that freights on such shipments were usually higher in the autumn than in the summer months. To all this evidence the defendants objected as inadmissible, but the judge admitted it.

"It appeared that from a strike of miners or some other cause, the price of coal advanced in Philadelphia from $3.50 per ton, in July, to $5.00, in October and November, when the last coal was delivered; and that freights were usually, but not always, higher in the autumn than in the summer months; that the plaintiffs paid the freights from Philadelphia on all the cargoes which they received; that they made no complaint of delay upon any shipment previous to October 1, and that they had no opportunity to test the quality of the coal, until they began to use it in their works at Lowell; and it did not appear that the freights in the latter part of September were lower than the average rate during the three months from July 1.

"The defendants offered evidence tending to show that, shortly before the expiration of the time limited by the contract, and when it had become manifest that the coal could not all be delivered in that time, their agent applied to the plaintiffs' treasurer to inquire whether they would receive, after the time limited by the contract, what remained to be delivered; and the answer was, that they not only would consent to, but insisted upon its delivery. The plaintiffs offered evidence tending to show that the treasurer said at the same time that the plaintiffs would claim damages for any increase in the cost of the coal at Lowell produced by any advance in freights and insurance. The defendants denied that any such notice was given to their agent, or any such claim

made; and they introduced evidence tending to show that all objection on the part of the plaintiffs, on the ground of the delay, was waived, if the defendants would agree to pay the increased expense of insurance, which they did agree to do.

"There was also evidence that the coal objected to as bad in quality arrived at Lowell at different dates, but early in May, and that the defendants were notified that it was not satisfactory late in that month, and sent one of their firm to Lowell to examine it; but whether there was any neglect or delay in giving notice of the objection within a proper time, was one of the questions of fact submitted to the jury under instructions to which no exception was taken.

"The defendants asked the judge to rule that, if the plaintiffs had any claim on the ground of delay in the delivery, their damages were to be estimated by the difference in the market value of the coal, between the time embraced in the contract and the time of actual delivery; and they objected to all evidence of increased rates of freight and insurance on that ground. They also asked the judge to rule that, by demanding the delivery of the coal after the expiration of the contract period, and then accepting it, the plaintiffs had waived the element of time in the contract, and insisted that, if the plaintiffs could recover for difference in freight and insurance, it would be only for the excess paid above the rates paid for shipments made at the termination of the contract period, and not above the average rates of that period; and that if they had any claim for deficiency in quality, it must be for difference in value at the place of delivery, and not at Lowell, the place of consumption."

The judge did not rule as requested, but instructed the jury "that, if the plaintiffs received the coal at Lowell without any complaint or objection on account of its bad quality or the delay in delivery, it would be *prima facie* evidence of a waiver of all objection on either of these grounds; but if, on trial of it at their works, and within a reasonable time thereafter, they gave notice to the defendants that damages or allowance would be claimed on account of its bad quality, such receiving of the coal would not be evidence of a waiver of that objection; that if on consenting to receive that portion of the coal which was delivered after the expiration of the

contract period they gave notice that they should claim damages for increased expenses growing out of such delay, receiving it under such circumstances would not be evidence of a waiver of that objection; that, if the delay in the delivery of the coal increased its cost to the plaintiffs by increasing the charges for freight and insurance above the average rate for those items or shipments during the contract period, they would be entitled in this action to recover such actual increase of the cost, unless some waiver or modification of the agreement in that respect should be shown; and that if the plaintiffs proved that any portion of the coal delivered was inferior in quality to what they were entitled to receive, they were entitled to recover any allowance for such deficiency in value, or for the difference between the value of the coal delivered at Lowell and that of the coal which by the contract they were entitled to receive, unless some waiver of objection for that cause were shown, without reference to the value at the place of shipment."

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

B. R. CURTIS and B. DEAN (T. DEAN with them), for the defendants.

J. G. ABBOTT (S. A. B. ABBOTT with him), for the plaintiffs.

COLT, J.

The plaintiffs claim damages both on account of the inferior quality of the coal delivered, and the failure to deliver within the time named in the contract. The defendants insist that both claims were waived. As to the first, there was evidence that the quality of the coal was objected to within a reasonable time after its receipt. And as to the second, there was evidence of an oral arrangement for delivery after the expiration of the time named in the contract, upon which the judge was asked to rule as matter of law. But the arrangement was a matter upon which the evidence was conflicting, and tended on the one side to show an unconditional consent of the plaintiffs to extend the time, and on the other

that the subsequent delivery, consented to or insisted on, was to be subject to the claim for any increased cost occasioned by advances in freights or insurance. Whether there was an intentional and unconditional surrender of the right to have the coal delivered according to the terms of the contract, both as respects time and quality, was in the province of the jury to decide, and the question was left to them with appropriate instructions: *Fox* v. *Harding*, 7 Cush. 516, 520.

As to the rule of damages, the plaintiffs are entitled to recover for such losses as were the direct and natural consequence of the defendant's failure to perform, and also for such as were foreseen, or may reasonably be supposed to have been foreseen, at the time of making the contract. To ascertain what they were, resort must be had to the terms of the contract for its meaning as applied to the subject-matter, and as interpreted by the general and known usages of the business to which it refers. It was in substance an arrangement to deliver, on board of vessels at Philadelphia, to the plaintiffs, who are a manufacturing company at Lowell, at a fixed price, a large quantity of coal, in equal monthly proportions, during the time included in the contract. A sample was to be sent and tested by the plaintiffs and bills of lading made to wharves either in Salem or Boston, at the plaintiffs' option, so as to be conveniently delivered to the cars in either place, as customary, and without doubt contemplating its further transportation by rail to the plaintiffs' place of business. It was therefore not simply the sale of property to be delivered at a particular time and place, but it was an agreement for the delivery of property to be transported by vessels and by railroad at the plaintiffs' expense, to their place of business in Lowell.

This construction of the contract fully sustains the rule of damages laid down at the trial. The loss from inferior quality to which the plaintiffs are entitled, is the loss which they sustained at Lowell. There is nothing in the case to show that they were bound, or that it was expected they would be bound, by any prior acceptance of it, at the place of shipment or elsewhere, and so the loss by the increased charges for freight and insurance is a fair measure of damage to them, ascertained by the failure to deliver in time. Nor do we per-

ceive that any wrong is done by taking the increased rates of freight and insurance above the average rates during the contract period, especially as it does not appear that the average rates for shipment were higher than the rates paid at the termination of the contract period. These items of damage are fairly contemplated by the contract.

The difference in market value of the coal between the time of actual delivery, and the time it should have been delivered, as a rule of damages, is not applicable. The plaintiffs received all the coal called for by the contract, at the contract price, and do not claim damages for any deficiency in quantity. They are entitled to the benefit of their contract, although the market value had increased by the delay.

The objections taken to the admissibility of the plaintiffs' evidence appear by this discussion to have been properly overruled. It was clearly competent for the treasurer to testify that he had long been in the practice of buying and receiving coal from Philadelphia, and that freights were usually higher in autumn than in summer. The understanding of the parties must be ascertained by the nature of the traffic to which the contract refers: *Cutting* v. *Grand Trunk Railway Co.*, 13 Allen, 381; *Batchelder* v. *Sturgis*, 3 Cush. 201, 204; *Bartlett* v. *Blanchard*, 13 Gray, 429.

Exceptions overruled.

BOWES v. RAVENSWORTH.

(15 C. B. 512. Common Pleas, 1855.)

Reservation construed—Coke, the "produce of a mine." By an enclosure act reciting that the defendant was lord of the manors of A and B, it was enacted that nothing therein contained should be construed to defeat or prejudice his rights as such lord; but that the lord, his heirs and assigns, should hold and enjoy all manorial rights, and also all mines, minerals and quarries, etc., belonging to the said manors, in as full and ample a manner as if the act had not been made; "and also full and free liberty at all times hereafter of making, etc., and of granting to any other person or persons any wagon ways, or other ways in, over or along the commons or waste land (intended to be allotted and enclosed), and to do every other act now in use, or which shall here-

after be used or invented, which shall be necessary to be done for the purpose of winning, working, leading and carrying away the said mines, minerals and quarries within and under the said last mentioned commons, etc.; *and also for the leading, carrying and conveying the coals and the produce of any other mines and minerals from or under any other lands or grounds whatsoever:*" *Held*, that the words "produce of any other mines and minerals," did not mean the produce of mines and minerals *other than coals*, but the produce of mines and minerals other than the "mines, minerals and quarries" before mentioned; and consequently, that the defendant had a right to use a railway constructed by him under the power so given to him, for the purpose of carrying *coke*, such coke not being made from coal worked out of the waste which was the subject of the enclosure.

This was an action brought by the plaintiff against the defendant for the purpose of trying a right of way claimed by the defendant for the conveying of coke over the plaintiff's land; and, by consent of the parties, and by order of MAULE, J., made on the 8th of November, 1854, according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court:

The piece of land over which the defendant claims a right of way to carry coke, is in the possession of the plaintiff, and is in Blackburn Fell, and parcel of the manor of Hecton, otherwise Ayton, and Ravensworth, otherwise Lamesley, in the county of Durham, and was formerly part of a common or waste land called Blackburn Fell, since enclosed in pursuance of an act of parliament, passed in the 41 G. 3 (cxliv.), entitled, "An act for dividing, allotting, and enclosing certain commons and other commonable lands in the parochial chapelries of Lamesley and Tanfield, or one of them, in the county of Durham," a copy of which accompanied the case.

By the award of the commssioners appointed and acting under that act, dated the 13th of March, 1818, the said piece of land was allotted to the Rt. Hon. John Bowes, Earl of Strathmore (from whom the plaintiff derives his title), in full of his proportion and interest in the commons wherein he was entitled to right of common. By the same award, an allotment was made to the defendant (then Sir Thomas Henry Liddell), as lord of the manors of Ayton and Ravensworth, in the following terms: "We do hereby set out, allot, appoint, and

award unto and for the said Sir Thomas Henry Liddell, Bart., and his successors, as lord of the manor of Hecton, otherwise Ayton and Ravensworth, otherwise Lamesley, in full compensation and satisfaction of his and their right and interest of, in, and to the soil of the said common, moors, or tracts of waste land, and, for his consent to said division, allotments, and enclosures, one full sixteenth part in value (quantity, quality and situation considered) of, and in the commons, moors, or tracts of waste land called Blackburn Fell, Burden Moor, Headley Fell, and Beamish East Moor, otherwise part of Blackburn Fell, respectively, 112 *a.* 2 *r.* 12 *p.* of land in one entire plot, as the same is now staked and set out by stakes and land marks, situate on the said Blackburn Fell."

The following clause in the said act (§ 40) bears on the present case: "Provided always, and be it further enacted, that nothing in this act contained shall be construed or adjudged to defeat, lessen, or prejudice the right, title, or interest of the said Sir Thomas Henry Liddell, as lord of the manors of Hector otherwise Ayton, and Ravensworth otherwise Lamesley, his heirs or assigns, or any of them, of, in and to the seigniory and royalties incident and belonging to the said manors; but that the lord of the said manors, his heirs and assigns, shall and may, from time to time, and at all times hereafter, hold and enjoy all courts, perquisites, and profits of courts, and services, and all yearly and other rents and acknowledgments reserved and usually paid, and which are due and demandable for all, any, or every of the houses, buildings, cottages, intacks, or enclosures now built, made, being, or standing in or upon the said commons, moors, or tracts of waste land, or the boundaries thereof, or in or upon any ground formerly part of the said commons, moors, or tracts of waste land now held or enjoyed in severalty, and which heretofore had been or which ought to be paid, made, or performed by the owners or possessors for the time being of such houses, buildings, or cottages, or of any of the intacks or enclosures heretofore parcel of the said commons, moors, or tracts of waste land, and now held and enjoyed in severalty; and also all waifs, strays, estrays, mines, minerals, and quarries, and all royalties,

jurisdictions, matters, and things whatsoever to the said manor of Hecton otherwise Ayton, and Ravensworth otherwise Lamesley, incident, belonging, or appertaining (other than and except such common right as could or might be claimed by him or them as owner or owners of the soil and inheritance of the said commons, moors, or tracts of waste land called Blackburn Fell and Burdon Moor, and other than and except the coal mines, and seams of coal within and under that part of the said commons, moors, or tracts of waste land called Blackburn Fell), in as full, ample, and beneficial a manner, to all intents and purposes, as he or they could or might have enjoyed the same if this act had not been made; and also full and free liberty at all times hereafter of making, laying, repairing, and using, and of granting to any other person or persons, any wagon way or wagon ways, or other way or ways whatsoever, in, through, over, or along the said commons, moors, or tracts of waste land called Blackburn Fell and Burdon Moor, and in, through, over, and along the said town, fields and stinted pasture, called Ravensworth Four Fields, and Ravensworth South Pasture, or any part thereof, and, for that purpose, to take away and remove so much of any hedges, fences, or other obstructions thereon, and to do every act either now in use or which shall hereafter be used or invented, which shall be necessary to be done for the purpose of winning, working, leading, and carrying away the said mines, minerals, and quarries within and under the said last mentioned commons, moors, or tracts of waste land, and town fields and stinted pasture respectively (other than except as aforesaid), and also for the leading, carrying and conveying the coals, and the produce of any other mines and minerals, from or under any other lands and grounds whatsoever—he, the said Sir Thomas Henry Liddell, or his lessees or assigns, or the person or persons using and enjoying such liberties and privileges, making and paying such satisfaction for damage and spoil of ground, as hereinafter is mentioned."

Under the powers and reservations contained in the above clause, the defendant had lately,—within the last two years,—constructed a railway over that part of Blackburn Fell which was allotted to the Earl of Strathmore as before mentioned; and the defendant had used the said railway for the purpose

of carrying and conveying *coal* along the same. His right to do so is not in dispute. But he has used, and claims the right of using, the said railway for the purpose of carrying and conveying *coke* along it—such coke not being made from coal worked out of Blackburn Fell, and being carried and conveyed for the purpose of sale and shipment in the river Tyne. The plaintiff disputes the right so claimed.

The question for the opinion of the court, is, whether, under the facts stated, the defendant has such right to carry *coke* along the said railway.

BRAMWELL (with whom was V. WILLIAMS), for the plaintiff.

The liberty reserved or granted to the defendant by the enclosure act of 41 G. 3, cxliv. § 40, of making and using, and of granting to any other person, any wagon way or other way whatsoever over the lands called Blackburn Fell, for the purpose of mining, working, leading, and carrying away the mines, minerals, and quarries within and under certain lands therein mentioned, and also for leading, carrying, and conveying the *coals* and the *produce of any other mines and minerals* from and under any other lands and grounds whatsoever, does not, it is submitted, confer on the defendant the right of carrying, or of authorizing the carrying *coke* over the lands called Blackburn Fell. The uncontroverted facts of the case are these:—By the award of the commissioners under the Lamesley and Tanfield enclosure act, certain portions of common land were allotted to the defendant as lord of the manor, and also to those under whom the plaintiff claims,—the act reserving to Lord Ravensworth two separate rights; one, the right of taking mines and minerals; the other, a right to make or grant ways over the land for the purpose of carrying away the said mines or minerals; "and also for the purpose of leading, carrying, and conveying the coals and the produce of any *other* mines and minerals from or under any *other* lands and grounds whatsoever."

The question is, whether the act gave the defendant a right to carry coke,—in other words, whether "coke" is "coal"?

[CRESSWELL, J. The words are, "the coals, and the produce of any *other* mines and minerals." Could he have carried limestone?] That would be the produce of another "mine."

[JERVIS, C. J.—What do you understand by "mine"?] The underground works. [JERVIS, C. J.—That can not be. The section (40) reserves to the lord, his heirs and assigns, the right to take all *mines* and minerals.] Not in this part of the section. The preamble to the act recites that Lord Ravensworth, "as lord of the manor of Hecton otherwise Ayton, and Ravensworth otherwise Lamesley, is seized of or entitled to the soil and royalties of and within the said commons, moors, or tracts of waste land called Blackburn Fell and Burdon Moor respectively (except only the coal-mines and seams of coals within and under the said common, moor, or tract of waste land called Blackburn Fell); and is also seized of or entitled to all the coal-mines and seams of coal, and all other mines, minerals, and quarries within and under the said town, fields and stinted pasture called Ravensworth, Town Fields and Ravensworth South Pasture; and that Lord Ravensworth and Sir John Eden, Bart., as lords of the manor of Kibblesworth, are seized of or entitled to the soil and royalties of and within the common moor, or tract of waste land called Kibblesworth Common; and that Lord Ravensworth, as lord of the said manors of Hecton, otherwise Ayton, and Ravensworth, otherwise Lamesley, aforesaid, and the said Sir John Eden, as lord of the manor of Beamish aforesaid, claim respectively, or the one of them, to be seized of or entitled to the soil of the several commons, moors, or tracts of waste land which are called or known by the several names of Hedley Fell and Beamish East Moor, otherwise part of Blackburn Fell aforesaid."

Then the 40th section, intending to reserve certain of those rights, enacts that nothing in the act shall be construed or adjudged to defeat, lessen, or prejudice the right, title, or interest of Lord Ravensworth, as lord of the manors of Hecton, otherwise Ayton, and Ravensworth, otherwise Lamesley, his heirs or assigns, or any of them, of, in and to the seignory and royalties incident to the said manors, but that the lord of the said manors, his heirs and assigns, shall and may from time to time and at all times hereafter hold and enjoy all courts, etc, and also all waifs, etc, *mines*, *minerals*, and *quarries*, etc, to the said manors incident, belonging or appertaining, in as full, ample, and beneficial a manner to all intents and purposes as he or they could or might have enjoyed

the same if this act had not been made; and also full and free liberty at all times hereafter of making, laying, repairing, and using, and of granting to any other person or persons any wagon way or other way in or along the said commons, etc; and to do every act either now in use, or which hereafter shall be used or invented which shall be necessary to be done for the purpose of winning, working, leading, and carrying away the said mines, minerals, and quarries within and under the last mentioned commons, etc., and also for the leading, carrying and conveying the coals, and the produce of any other mines and minerals, from or under any other lands and grounds whatsoever.

The court will construe this as they would any other contract between the parties. [JERVIS, C. J.—It must be borne in mind, that, at the time of the passing of that act, coke was not, as it now is, an article of extensive commerce.] Unless "coke" is "coal," the defendant has not the right he claims. That it is not, is obvious. By combustion it has lost many of the properties and constituent parts of coal. It is chemically changed. Coke, as coke, is not the produce of any mine.

[JERVIS, C. J.—It can not be denied that it is the produce of a mineral.] That can not be the correct reading of the section; it means the raw produce, not operated upon in any way. The defendant can have no right to manufacture anything on the land, such as smelting ore, or the like. It was merely intended to give him a way-leave for the purpose of carrying the produce of mines in their native state.

WATSON (with whom was the Hon. A. LIDDELL), for the defendant.

The liberty reserved to the defendant by the 40th section of the act of parliament in question confers on him the right of carrying and of authorizing the carrying of coke over the lands called Blackburn Fell. "Coke" is "coal" within the meaning of this act. It is not a manufacture of any kind; it is nothing more than baked coal.

[JERVIS, C. J.—If you were driven to maintain the proposition that coke is coal, you would have some difficulty; the two substances are chemically different.

The reservation in question is a grant of a way-leave; and its words are to be taken most strongly against the grantor: *The Durham and Sunderland Railway Company* v. *Walker*, 2. Q. B. 968. It is quite an ordinary proceeding in modern times to convert coal into coke at the pit's mouth. The defendant's right to use the way is not restricted to the carrying of mines and minerals, the produce of the allotted lands, but extends also to the carrying of coals and *the produce of any other mines and minerals* from or under any other lands or grounds whatsoever.

[CRESSWELL, J.—How does the power given to the defendant by the 40th section affect his right to make a railway for any purpose he pleases? MAULE, J.—Would not a right to carry the produce of a forest include a right to carry the charcoal?]

Undoubtedly it would.

BRAMWELL, in reply.—The rule that the words of a grant are to be taken most strongly against the grantor, is not to be had recourse to until all other modes of ascertaining the meaning of the parties have been exhausted. The special right given to the defendant by § 40 to lay down wagon ways negatives the existence of any independent general right, nor will the general authority given to him to do every act either now in use, or which shall hereafter be used or invented, which shall be necessary to be done for the purpose of winning and carrying away the said mines and minerals within and under the allotted lands, and also for the purpose of carrying and conveying the coals and the produce of any other mines and minerals from or under any other lands, confer any such right.

"Other mines and minerals" must of necessity mean, other than coals; otherwise the words are insensible.

[MAULE, J.—Coke consists of coal with some gases expelled from it. Might not malt be properly said to be the produce of a farm?] No more than wine is the produce of a vineyard, or any article constructed of wood is the produce of a forest. The compensation clause, § 45, which provides for the assessment of damages for injury sustained by any person in his allotment, by the searching for, winning, or working the said mines and quarries therein, or the leading or carrying

away of the coals, lead, minerals, stones, or other things to be gotten thereout, or out of any other mines or quarries, or by the making, laying, repairing, or using of wagon ways, etc., tends to elucidate the meaning of the 40th section.

[MAULE, J.—That clause does not hurt you; nor do I think it at all aids your argument.]

JERVIS, C. J.—I am of opinion that our judgment in this case should be for the defendant; and I think that the necessity which drove Mr. BRAMWELL to the very refined argument he has urged upon the critical construction of the 40th section of the act in question, shows that we can arrive at no other conclusion; for, if every word of that section were examined and construed with grammatical accuracy, insuperable difficulties would present themselves on both sides.

I think, therefore, we must look at the general scope and intention of the act, and put the best construction we can upon it. It is clear that the framers of the act did not mean in any degree to interfere with the rights of the defendant as lord of the manors mentioned in the preamble of the act; the 40th section expressly provides that he, his heirs and assigns, shall hold and enjoy all courts, etc., and all waifs, strays, estrays, *mines*, *minerals*, and quarries, etc., and all things whatsoever to the said manors belonging, in as full, ample, and beneficial a manner to all intents and purposes as he or they could or might have enjoyed the same if that act had not been made; and it confers upon him the right of making and using, and of granting to any other person, any wagon way or other way in, through, over, and along the commons and wastes, and other works necessary for the winning, working, leading, and carrying away the said mines, minerals and quarries within and under the said common or waste land so reserved to him, and also for the carrying and conveying the coals and the produce of any *other* mines and minerals from or under any *other* land and grounds whatsoever. The defendant clearly had a right to carry along the way so made the produce of the mines under the commons or waste lands, in any form he might think fit; and, having the way, what is there to restrict him in the use of it?

The intention, I think, was that the defendant should have the right to carry, not only the mines and minerals from un-

der the commons to be enclosed, but also the coals and the produce of any other mines and minerals from or under any other lands—other than those before mentioned.

I do not think the repetition (perhaps unnecessary) of the word "other" at all alters its meaning in the previous part of the clause. I think, therefore, upon the fair construction of the act of parliament, the defendant was entitled to use the way in question for the conveyance of coke, the produce of coal taken from mines other than those in Blackburn Fell, and consequently that he is entitled to judgment upon this special case.

MAULE, J.—I am of the same opinion. The intention of the act is expressed in very copious language. But, considering the object the 40th section had in view, viz.: to retain to the lord of manor, his heirs and assigns, so far as was consistent with the rights conferred by the act upon other persons, all his rights with respect to minerals, and principally coals, and construing it with reference to that, the evident intention of that section was to reserve to the lord all his rights as to the mines and minerals under the lands to be allotted and enclosed under the powers of the act as amply as he enjoyed them before; and, for that purpose, he is empowered to make and to grant wagon-ways and other ways, for the conveyance of the produce of his own mines, and also for the purpose of carrying away the coals and the produce of any other mines and minerals from or under any other lands or grounds whatever.

In seems to me that the repetition of the word "other" was necessary; it meant to extend the right to all sorts of mines and minerals other than the particular mines and minerals before mentioned, but not to restrain it to the mines and minerals, the produce of those mines. It seems to me, therefore, that the general scope of the section and the precise words critically looked at, concur in showing that the construction which has been insisted upon by Mr. BRAMWELL is not that which ought to be adopted. I therefore agree with my Lord Chief Justice in thinking, that the defendant is entitled to our judgment.

CRESSWELL, J.—I am entirely of the same opinion. The earlier parts of the 40th section having reserved to the de-

fendant, as lord of the manors mentioned in the preamble, all his manorial rights, and all mines, minerals, and quarries, etc., incident or belonging thereto, in as full, ample, and beneficial a manner as if the act had not been made, the latter part gives him power to make and use, and to grant any wagon-ways or other ways over the land which was the subject of the allotment and enclosure, and to do every act, either then in use, or which should thereafter be used or invented, which should be necessary to be done for the purpose of winning, working, leading, and carrying away the said mines, minerals, and quarries within and under the last mentioned commons (the commons and waste lands to be enclosed); and then the section goes on, "and also for the leading, carrying, and conveying the coals and the produce of any other mines and minerals from or under any other lands and grounds whatsoever." I think the act intended to give the defendant as ample power to carry on the way in question, the coals and the produce of any other mines and minerals gotten in any other lands or ground, as he had to carry the produce of the mines on the wastes themselves, and that the word "other" was not unnecessarily repeated; it was probably intended to exclude the bringing of minerals along the way which might be imported from foreign countries. I think it can not be denied that "coke" is the produce of a mine within the meaning of this act. For these reasons, I am of opinion that the defendant is entitled to our judgment.

WILLIAMS, J.—I am of the same opinion, and for the reasons already given by the rest of the court.

Judgment for the defendant.

BOSWELL v. GREEN.

(25 New Jersey Law, 390. Supreme Court, 1856.)

Pleading—Inducement—Issue upon title to coal. To an action in replevin against a sheriff, he pleaded property in the defendant in the executions under which he took the goods, and alleged the *precise time* when he received the executions and when he seized the property, and that the goods were *then* the property of defendant in execution; the plaintiff

traversed by replication in the usual form and issue was thereupon joined. The jury found that, *at the time alleged in the declaration*, the property in the goods was in the plaintiff. Upon objection that the jury had not passed upon the issues made by the pleadings, *held*, that the allegations relative to the time of the seizure were merely matters of inducement, and that the response of the jury, that the property was in the plaintiff, directly met and decided the issue of fact.

Error not in record. The court can not notice matter alleged for error, unless it appears on the record.

Sale by partner valid unless fraudulent. For the purpose of selling the effects and paying partnership debts, each partner is considered the authorized agent of the firm, and unless he acts fraudulently, or in violation of an agreement or term of the partnership, and the party with whom he deals knows the fact, courts will not interfere.

Consideration. The legal obligation to pay the price is a good consideration for the sale of goods.

Sale when complete—Intention. Where it is clear, by the terms of a contract that parties intend that a sale shall be complete before the article sold is weighed or measured, the property will pass before this is done.

Vendor and purchaser—Coal on wharf. Where the owner of coal lying on the wharf orders the wharfinger to deliver it to a purchaser, and the wharfinger agrees to deliver upon the purchaser paying the wharfage, the delivery is complete, so far as an execution creditor of the vendor is concerned.

Error to Mercer Circuit.

An action of replevin was brought by Edward M. Green against William Boswell, sheriff, to recover a quantity of coal levied upon by said Boswell as the property of Dewar, Mein & Kay.

The coal was lying on the wharf of Jonathan S. Fish & Co., and Green claimed it by virtue of a bill of sale executed to him by Kay, one of the partners, in the name of the firm.

The sheriff gave bond, retained the coal in his possession, and sold it by virtue of the execution under which he levied upon it.

The case was tried before a jury, at the Mercer Circuit, May term, 1855, and a verdict rendered for the plaintiff for $2,866.43 damages with costs.

The facts in the case and the grounds relied upon for reversal are fully stated in the opinion of the court.

Argued at November term, 1855, before the Chief Justice, and Justices ELMER, POTTS and HAINES.

SCUDDER & GILCHRIST, for plaintiff in error.

BEASLEY, for defendant.

POTTS J.

This was an action of replevin brought by Edward M. Green against William Boswell, sheriff of the county of Mercer. Boswell, by virtue of executions in his hands, seized a lot of coal, lying at the coal yard of Fish & Co. as the property of Dewar, Mein & Kay, the defendants in execution. Green thereupon issued his writ of replevin, claiming to have purchased the coal from Dewar, Mein & Kay. The sheriff gave the usual bond; the coal was left in his possession, and subsequently sold for the benefit of the execution creditors. On the trial, the verdict was for Green, the plaintiff, and the jury assessed his damages at $2,866.43 and costs. The several matters assigned as errors will be noticed in the order in which they were discussed on the argument.

1. It is insisted that the jury have not passed upon all the issues made by the pleadings.

The declaration is in the *detinuit;* that the defendant on the first of September, 1854, took and unjustly detained the goods, etc.

The defendant pleaded—1, *non cepit.*

2. That the said goods, etc., at the said time when, etc., were the property of Dewar, Mein & Kay, and not of the said Green.

Avowry 1. That he was sheriff, etc., and that on the 7th of September, 1854, an execution in favor of G. & D. issued, etc. against Dewar, Mein & Kay, was, at seven A. M., delivered to him, and on the 7th September, etc., he seized the coal as the property of D., M. & K.; and that the said goods, etc., at the time of seizing and taking the same, were the goods, etc., of D., M. & K., and not the goods, etc., of said Green.

2. Same as above, except that execution was in favor of G. D. & C., and delivered at 6 P. M. on 7th September.

3. Same as first, except that the said goods, etc., at the time of the delivery of the execution in this avowry mentioned to the defendant, were the goods of James Dewar, Robert Mein

and William Kay, to wit, at seven A. M., of 7th September, 1854, and not the goods of Green.

4. Same as last, except that execution was in favor of G. D. & C. and delivered at six A. M., on 7th September, 1854.

The plaintiff, as to the first plea, joins issue; as to the second, replies, that at the same time when, etc., the property was in the plaintiff; and to the avowries that at the time when, etc., the property was in the plaintiff, in manner and form as he hath in his declaration aforesaid alleged. *Similiter* by the defendant.

The verdict is, that, as to the first issue joined, the defendant did take the goods, etc.; and as to the issues, secondly, thirdly, fourthly, fifthly and sixthly above joined, they say, that, at the time in that behalf alleged in the declaration, the property in the said goods, etc., was in the said plaintiff, in manner and form as he hath in his said declaration alleged; and they assess the damages of the said plaintiff, by reason of the premises, over and above his costs and charges by him about his suit in that behalf expended, to $2,866.43, and costs six cents. Judgment for damages as found.

The point of objection is, that the jury should have found specifically whether the goods were or were not the property of the plaintiff on the 7th September, 1854, at the hours mentioned in the several avowries. But the objection is not well founded. The issue joined, the material question of fact upon which the jury were to pass, was, whether the plaintiff had such a title to the property as would enable him to maintain his action. The gravamen of the charge in the declaration was the unlawful taking of the property of the plaintiff. The several avowries admit the taking and traverse property in the plaintiff. What precedes this traverse, to wit, the allegation of the delivery of the executions to the sheriff, the time when they were delivered, and when the seizure was made, and that the goods were then the property of Dewar, Mein & Kay, etc., is matter of inducement merely, matter going to show how, by what means the defendant claimed to have acquired the title: *Bemus* v. *Beeckman*, 3 Wend. 672; *Prosser* v. *Woodward*, 21 Wend. 207, and not traversable. Therefore the replication to the several avowries passes by the matters of inducement, and re-affirms title to the property in the plaint-

iff. So that the issue was joined upon that single matter, affirmed on one side, and denied on the other.

To maintain the issue on his part, it was doubtless necessary for the plaintiff to prove on the trial, in answer to the case made by the defendant, that his title was acquired previous to the delivery of either of the executions to the sheriff; for, otherwise, he would not have maintained his allegation, that the taking by the defendant was unlawful, that the property at the time was in the plaintiff. The sheriff claimed the coal by virtue of executions in his hands against Dewar, Mein & Kay. The plaintiff, Green, claimed them as a purchaser from the same parties; and, as an execution binds the goods of a defendant, both as against him and those claiming under him, from the time of its delivery to the sheriff (*Newell* v. *Sibley*, 1 South. 381), it became the important question in the cause, whether the executions, or either of them, had been delivered to the sheriff prior to the completion of the sale of the coal to the plaintiff; but this resolved itself into the simple issue of title or no title in the plaintiff; and the response of the jury, that the property was in the plaintiff, directly met and decided the issue of fact.

II. Another objection taken is, that the verdict was for the value of the goods, whereas the counsel for the defendant insists it should have been for damages for the detention merely. But it is sufficient to say, that there is no error manifest upon the record. The matter alleged as error does not appear.

III. Again, it is alleged for error, that the judge charged the jury that Kay alone, without the assent of his co-partners, had a right to sign a bill of sale for the coal. The bill of sale was as follows:

"This is to certify that Edward M. Green has this day purchased of us all the coal, our property, now on the wharf of Jona. S. Fish & Co., at $4.70 per ton for the egg and stove coal, and $4 for chestnut, and we hereby direct the said Jona. S. Fish & Co. to deliver possession of said coal to said Green. Dated Sept. 6, 1854. DEWAR, MEIN & KAY."

The evidence was, that the coal had been purchased of Green by the firm, and lay on Fish & Co.'s wharf; that the firm was embarrassed at the time, and gave their notes for

the amount to Green; that the notes were unpaid. Kay swears that, on the 5th September, a note of that date was written, by the direction of the firm, to Green, advising him that they were unable to get along, and requesting him immediately to appropriate the coal to his own benefit or as his own property; that Cochrane, their clerk, wrote the note; that he, Kay, and Mein were present when it was written, and he presumed Dewar knew of its being written, for they had talked the matter over previously; that Green came on the 6th, and he, Kay, made and executed the above bill of sale, and gave it to Green, none of the other partners being present or being consulted; that Green paid nothing, and nothing was said about his taking up the notes which the firm had given him for the coal. Cochrane testifies that Dewar knew nothing of the giving of the bill of sale. Mein testifies that the firm failed on the 5th and 6th September; that the firm did not sell the coal; that he was never consulted about the sale, never signed any bill of sale, and that the firm never received any consideration for it.

But, nevertheless, the charge complained of was right. Each partner has an entire control over the personal property of the partnership. For the purpose of selling the effects, and paying partnership debts, he is considered the authorized agent of the firm. If he acts fraudulently, or in violation of any agreement or term of the partnership, and the party with whom he deals is cognizant of the fact, courts will interfere and give relief; but there does not appear to have been any fraud or any excess of authority in this transaction. The effect of it was simply to prefer, so far as the coal would go, the creditor from whom it had been purchased: *Pierson* v. *Hooker*, 3 Johns. R. 68; *Pearpoint and Lord* v. *Graham*, 4 Wash. C. C. R. 234; *Harrison* v. *Sterry et al.*, 5 Cranch. 289; 1 Parsons on Con. 156, note w.; 3 Kent's Com. 44; *Tillou* v. *Britton*, 4 Halst. 135.

IV. But it is contended that there was no consideration given for the coal because no money paid at the time, no promise of payment by the purchaser, nor indorsement of credit on the notes, a part of which had been discounted or passed away; and that there was, therefore, error in the charge

"that the bill of sale was for a valuable consideration, and not fraudulent and void as against creditors."

Upon its face the bill of sale was for a consideration, a fixed price per ton for the several kinds of coal; and in every sale of personal property the law implies a promise to pay, raises an obligation, so that the vendee shall compensate the vendor in the amount of the price or value agreed on, if any, and if no value is fixed, then for the actual value to be ascertained. This legal obligation to pay is a good consideration for the sale, gives it validity and relieves it from the imputation of fraud. Besides, as already intimated, there was nothing in the transaction that wore the semblance of fraud. The firm had used part of the coal, and Green had used part of the notes; the balance of the coal sold to Green amounted to about $2,800; the balance of notes remaining in Green's hands, or under his control, amounted to nearly $2,200; and he was of course responsible as indorser on those he had got discounted; so that there was no doubt of his becoming in the end a creditor of the firm to a much larger amount than their claim against him.

V. Another ground of error assigned is, that the court charged the jury "that it was not necessary to pass the title to the coal; that the whole quantity should be ascertained; and that the title to the coal, if the jury believed the witnesses, did vest in the plaintiff before the aggregate price was known; and that the coal was not till then at the risk of the seller, but at the risk of the said Green, after the delivery by J. S. Fish & Co.;" whereas the judge ought to have charged that it was necessary to pass the title that the whole quantity of coal should be ascertained, and that the title did not vest in the plaintiff before the aggregate price was known, and that there was no delivery by Fish & Co.

The quantity of coal was not ascertained at the time of the making and delivery of the bill of sale of the 6th September. It lay on the wharf of Fish & Co. All that Kay, in the name of the firm did was to deliver the paper, at the time it was signed, to Green. Fish says, "on the morning of the 6th September, Green called on me with the order of that date. I told him I had no objection to giving the coal to him, subject to the claim of Fish & Co. for $108.18 for wharfage. I gave

him possession, subject to our claim, by signing at the foot of the order this note: "Possession delivered of the above mentioned coal in compliance of the above order, subject to a payment of $108.18 for unloading and wharfage on this coal. September 6, 1854. J. S. Fish & Co."

The coal remained where it lay, and on the morning of the 7th was levied on by the defendant under the execution in his hands, and subsequently sold by him, to wit, 464 tons of egg coal, 132 tons of chestnut and 25½ tons of stove coal. The sheriff paid Fish & Co. the $108.18 the morning after the sale.

These are substantially the facts proved. The question is, was the sale and delivery to Green complete, so as to vest the title in him on the 6th September. The defendants' counsel insists it was not, and the title did not vest, because the quantity of coal had not been ascertained. There is abundant authority for the doctrine that the property does not pass absolutely unless the sale be completed; that it is not completed until the happening of any event expressly provided for, or so long as anything remains to be done to the thing sold to put it into a condition for sale, or to identify it or discriminate it from other things, or to determine its quantity, if the price depends on this, unless this is to be done by the buyer alone: 1 Parsons on Cont. 441; *Simmons* v. *Swift*, 5 Barn. & Cress. 857; *Alexander* v. *Gardner*, 1 Bingham's N. C. 671, per Justice PARK; *Swanwick* v. *Sothern*, 9 Adol. & Ellis, 895, per Lord DENMAN; *Hanson* v. *Meyer*, 6 East, 614; *Rapelye* v. *Mackie*, 6 Cowen, 250; *Outwater* v. *Dodge*, 7 Cowen, 85; *Ward* v. *Shaw*, 7 Wend. 404; and see cases collected in Ross on Contracts, p. 1, etc.

But these are all cases upon the construction of contracts, where the intention of the parties was the real question in controversy; where it is clear, by the terms of the contract, that the parties intended that the sale should be complete before the article sold is weighed or measured, the property will pass before this is done: *Tarling* v. *Baxter*, 6 Barn. & Cress. 360, per BAYLEY, J.; *Logan* v. *Mesurier*, 6 Moore's P. C. Cases, 131, per LORD BROUGHAM; *Riddle* v. *Varnum*, 20 Pick. 280. It must be so. There is nothing illegal in such a

contract; and where contracts are legal, made in good faith, and not contrary to public policy, courts are bound to give them effect according to the clearly expressed intention of the parties who make them.

In this case the bill of sale, the order for delivery, and the memorandum of delivery were in writing. The intention to sell and pass the title and possession at the time was clear upon the face of the papers, and was supported by the evidence. The legal inference, from the facts and documents before the court, undoubtedly was, that the title passed, and so the court told the jury. There is no error in this.

VI. The last matter assigned for error which it is necessary to notice is, that the court told the jury that Green was entitled to the immediate possession of the coal, when the same was delivered to him by Fish & Co., although delivered subject to the payment of wharfage, etc. There was no error in this. When the wharfinger executed the memorandum which was read in evidence, that paper operated as a delivery, an attornment to Green; and Green then had the same possession that Dewar, Mein & Kay had before, a possession subject merely to lien for wharfage, etc., if Fish & Co. chose to enforce it. The delivery, the right of property, and the right of possession was complete, so far as the parties to this suit are concerned; and that is all that is fairly inferable from the charge, and all that was necessary to support the action.

The judgment should be affirmed.

The Chief Justice, and ELMER and HAINES, Justices, concurred.

Affirmed.

NELDON v. SMITH.

(36 New Jersey Law, 148. Supreme Court, 1873.)

Sale, by shipper, conditioned on receipts from mines. A contract by vendor, to ship coal as soon as it is received from the mines, with a

proviso that the contract is not to bind if the coal company fail to deliver it to the vendor according to special arrangement recited, calling for *immediate delivery*, is a conditional contract. The coal company failing to deliver to the vendor, vendor is not bound to ship.

Subsequent receipts of shipper—Option. If coal is received from the mines after the time named in the contract with the coal company, and intended in the contract between the parties, the seller is not bound to deliver it, nor is the buyer bound to receive it. The buyer has not an *option* to take it for the price named in the contract.

Immediate delivery defined. The term "immediate delivery" explained to mean among coal shippers and dealers a delivery within the present, or in some cases, the preceding month, and thus interpreted in the contract.

Accord, distinguished from continuing contract. When coal was accepted by the seller by a parol agreement with the coal company, after the breach in settlement of damages claimed for the breach, *held*, to be an accord and satisfaction, and not a delivery under the former contract.

In case. On motion to set aside the verdict.

At the trial of the above cause in the Sussex Circuit Court, in April term, 1872, a verdict was rendered for the plaintiff upon the facts, and several points of law were reserved for the opinion of this court.

The following are the material facts of the case.

July 29, 1865, a contract in writing was signed by the plaintiff and defendant in these words:

"I agree to take from S. T. Smith three boat loads of coal, delivered at Waterloo, for $5.65-100, to be either egg or stove, as soon as coal is delivered from the mine, from this date, July 29, '65, *said Neldon to take it in boats at Waterloo, and does not bind said Smith unless Del. Lack. & West. Co. deliver the coal to him as per offer of S. B. French's, per letter of July 11th, 1865.*

(Stamp.) "G. H. NELDON,
"SAMUEL T. SMITH."

The former part of the agreement is in the handwriting of the plaintiff, and the latter was written by the defendant.

This was entered in a memorandum book of the plaintiff.

In a few minutes after this was signed by the parties, they went to the defendant's store and there the defendant drew up a contract similar to the above in his own memorandum book, saying he would like to have a copy of the contract they had made; and it was also signed by them.

It reads thus:

"Engaged July 29, 1865, to G. H. Neldon, Esq., three boat loads of coal, at five dollars and sixty-five cents ($5.65) per ton, m'fst weight, delivered in boats at Waterloo, provided Del. Lack. & West. R. R. Co. deliver the coal to me, agreeable to price and conditions of B. S. French, agent's letter of July 11th, 1865, the coal not to be shipped out of the present stock in yard at Washington, but to come fresh from the mines.

"SAMUEL T. SMITH,

"July 29, 1865. "GEO. H. NELDON."

Directly below this entry was the following, in the defendant's writing:

"P. S. If said coal is not delivered by Sept. 1st, (agreeable to Mr. French's offer to me) then I agree to rescind my engagement with Mr. Neldon, and the above is to be considered void and of no effect."

(Stamp.)

The letter of B. S. French, referred to in these two entries, is as follows:

"The Delaware, Lackawanna & Western R. R. Co.—Coal Department:

"Agency at Washington, N. J.,

"July 11, 1865.

"S. T. SMITH, Esq.—*Dear sir:* I will make you 500 l. tons or more for immediate delivery, at $5.25, at Waterloo. This will give you a good wholesale commission. I think I have sold no coal at your place for less than $6. This offer holds good only to the 20th of this month.

"Yours truly,

"B. S. FRENCH, Agent,

"per C. E. FRENCH."

By letter of July 15, 1865, from B. S. French, agent, to the defendant, S. T. Smith, at the request of the latter, the privilege of acceptance was extended to July 30th. The defendant wrote a letter to French, July 28, 1865, accepting the offer of July 11, 1865, and time extended, per letter of the 20th inst., to 30th inst.

There was a strike in the company's mines. It began about July 25th, and continued until about September 26th,

during which time the production and shipment of coal from these mines were entirely suspended.

August 30th defendant wrote to plaintiff this letter:

"G. H. NELDON, Esq.,—*Dear Sir:* I have heard nothing from the Del. Lack. & West. R. R. Co. as to shipping me coal. Understand the miners have not resumed work yet. By conditions of our agreement the same is rescinded and of no effect if coal is not delivered by September 1st. If they commence shipping, which I think they must soon, will see you and make another arrangement. Will give you the advantage over all others, and the refusal of my surplus. I may see you soon, when we will talk the matter over.

"Yours truly, SAMUEL T. SMITH."

September 4, 1865, plaintiff wrote as follows:

"S. T. SMITH, Esq.,—*Dear Sir:* As soon as you learn that coal arrives in Washington please let me know, as I am in want of some under my contract with you."

"Yours truly, GEO. H. NELDON."

September 5th, defendant answered:

"G. H. NELDON, Esq.,—*Dear Sir:* Your favor 4th inst., received. I wrote you day or two ago of the expiration of our contract by limitation, and stated that if I got more coal than I needed I would give you refusal of it, which I still intend doing, and will make price lower to you than any other parties. There is no coal coming in Washington yet, and I can learn of no indications, as the strike continues the same."

"Yours truly, SAMUEL T. SMITH."

"P. S.—You will doubtless remember that our contract is conditioned to be null and void if coal was not delivered previous to the 1st inst. S. T. S."

September 1, 1865, the plaintiff went to Waterloo, saw the defendant there, and demanded the coal. Defendant replied that he had not any, that none had arrived; that the contract was void by its terms, and refused to deliver.

September 27th, the company, by circular, notified the defendant, that by reason of the strike they canceled their contract to deliver coal to him.

Afterward the defendant went to the company's office in New York, and insisted on the delivery of coal to him under the contract. The company replied that they were discharged

by the rules of the trade in consequence of the strike. The defendant threatened suit for damages unless they satisfied him. The price of coal had advanced and he was willing to take the difference between the contract price and the price for which he was then selling. Finally a settlement was made, and the company directed Mr. French to ship the coal to the defendant at the price agreed upon to satisfy his claim.

A boat load of coal, 66 2-20 tons, had been shipped to defendant July 18, 1865; this was ten days before the contract was accepted.

Between October 7th and November 30th, the company shipped to defendant about 465 tons, in seven or eight different boats at different times. The defendant agreed to accept the boat load of coal shipped July 18th, as part of the 500 tons, and thus more than the amount was delivered, about 530 tons in all, at the rate of $5.25 per ton.

The action was brought in this court, June term, 1871. Argued at November term, 1872, before BEASLEY, Chief Justice, and Justices BEDLE, DALRIMPLE and SCUDDER.

For the plaintiff, T. N. MCCARTER and PITNEY.

For the defendant, R. HAMILTON and VANATTA.

SCUDDER, J.—The principal question of law in this case for our determination relates to the true construction of the written contract between the parties in this particular; whether the terms impose a reciprocal obligation to deliver and receive the coal bargained for within a certain time, with the condition that the sale shall be void if the coal does not arrive within such time; or whether the time may be extended at the option of the purchaser until delivery shall be made.

The defendant insists that after September 1, 1865, he was not bound to deliver any coal to the plaintiff under this contract, and that the reciprocal obligation to deliver and receive ceased at that time; the plaintiff claims that whenever the defendant received coal from the company under his contract with them, he was entitled to demand and receive the same at his option.

The two writings signed by the parties and entered in their memorandum books are not alike in language, but they sub-

stantially agree, and were made at the same time to express the terms of the contract. The former entry was made in the plaintiff's book with a pencil, as they stood together and bargained on the bridge, and the latter a few minutes after when they entered the defendant's store, and there the terms were written out more distinctly and fully in his book with pen and ink. They were intended to be originals, not copies, and are to be construed together to arrive at the intention of the parties.

Taken together they constitute an agreement for the sale and purchase of three boat loads of coal (about 200 tons) at five dollars and sixty-five cents ($5.65) per ton, to be delivered from the mines in boats at Waterloo, upon the condition that the Del., Lack. & Western Railroad Company deliver the coal to the defendant, Samuel T. Smith, agreeably to the terms of their contract with him. The contract with the company is based on the offer of B. S. French, agent, dated July 11, 1865, with the time of acceptance extended to July 30th, the acceptance of which formed the agreement and this offer is incorporated into the condition of the contract between the plaintiff and defendant.

The condition would then be, provided the Del., Lack. & West. Railroad Co. make immediate delivery of 500 tons or more of coal to Smith at Waterloo, at $5.25 per ton. The words "immediate delivery" in ordinary language mean to deliver forthwith; but this expression is explained in the testimony as having a trade meaning among coal shippers and dealers, to which latter class the plaintiff and defendant belong. It means a delivery during the current month in which the offer is made and accepted, unless the contract is made on the last day of the month, or within such limited time that it can not be shipped, and then the whole of the following month may be given. According to this interpretation, the contract between the Del., Lack. & West. Railroad Co. and Samuel T. Smith having been made July 28, 1865, and immediate delivery would be extended through the following month of August. As the company had that time to deliver to Smith, the defendant, so by the condition of his contract with Neldon he had the same time to deliver coal to him at Waterloo, and Neldon was bound to receive it if delivered within that time. If, however, another construction of

this contract is made, and it should be held that Neldon only agreed to take the coal according to the offer of July 11th, which limited an acceptance to the 20th inst. without the extension given to the 30th, and that an immediate delivery must be construed to be within that month, then neither party would be bound beyond that time. In either case, the sale of coal was made upon a proviso or condition that it should be delivered within a certain time and for a certain price. If the company delivered to Smith within the time and for the price stipulated, he was to deliver to Neldon under their contract, and Neldon was bound to receive the coal. If, however, the company failed to deliver to Smith within the time and for the price stipulated, he was free from his obligation to deliver, and Neldon was free from his promise to receive. The condition affects the obligation of each party, and is reciprocal.

The cases relating to goods sold on condition to arrive, were elaborately cited and reviewed by the counsel in their arguments before the court. The conclusion to which we must come, after a careful examination of these cases is, that a sale to arrive is conditional, and that if the article contracted for does not arrive, either from the vessel being lost or other cause by any accident, and without any fraud or fault of the vendor, the contract is at an end. The contract is executory and does not pass the property in the goods to arrive. It is merely an agreement for the sale and delivery of the articles named, at a future period when they shall arrive. It is in the nature of a condition and not a warranty: *Boyd* v. *Siffkin*, 2 Camp. 326; *Johnson* v. *McDonald*, 9 M. & W. 600; *Lovett* v. *Hamilton*, 5 Ib. 639; *Gorrissen* v. *Perrin*, 4 C. B. (89 E. C. L.) 681; *Hale* v. *Rawson*, 4 Ib. (93 Ib.) 85; *Russell* v. *Nicoll*, 3 Wend. 112; *Shields* v. *Pettee*, 2 Sandf. 262; S. C., 4 Comst. 122; *Davis* v. *Shields*, 26 Wend. 341; 1 Pars. Cont. 552, and notes.

The same principles of law are applicable to this case, as it is an agreement to sell upon an express condition. The difference between the cases cited and the different results arrived at in the courts, which are sometimes nice and quite close, are referable to the exact terms of the contract, which must control the usual form and the construction of such bargains.

The argument of the plaintiff's counsel that this condition,

if it be such, to deliver within a certain time was for the benefit of the plaintiff, and that he only could avoid having an election, is based upon other facts, and another principle of law applicable to those facts. The performance of the stipulation, where it is held a party has an option, depends on the acts of the parties themselves, and not upon the acts of others over whom they have no control. If either party, therefore, fail to perform, he would, by his own act, defeat the condition, and have the benefit of his own wrong. Take as an illustration the case of *Canfield* v. *Westcott*, 5 Cow. 270. In articles for the sale of land by which the vendee covenants to pay, and the vendor covenants to convey on payment, and the vendee agrees that if he fails in his covenant the contract shall be void, or there is a general proviso that if the vendee do not perform it shall be void, here the contract is voidable only at the election of the vendor.

The reason is obvious. The vendee, by his own default, his refusal to pay, may defeat the contract and annul the sale.

The court *held*, in that case, that on the vendee's default to pay, the vendor might consider the agreement void at his own election, or affirm it, and bring his action on the covenants.

To the same effect are the authorities cited in the notes to this case. See also *Rede* v. *Farr*, 6 M. & S. 121; Taylor's Landlord and Tenant, 492.

The case now under consideration differs, because the condition here is, if the railroad company, a third party, with whom the vendor had contracted for coal, shall deliver it to him at a certain time and for a fixed price, he will sell and deliver to the vendee. This, as has already been said, is not a warranty that he will deliver, but a condition. It is also a condition based on the act of another, and if that other party fail to deliver without the fault of the vendor, the contract falls. The terms of the condition and of the sale are not for the benefit of either party, in exclusion of the other. It is not an indifferent matter to the defendant, when he shall receive and deliver the coal. The price and time are both made essential by the terms of the condition, and by the facts of the case. If the goods are delivered at a different time, or at a different price than the one stipulated for, the situation of both

parties is changed. The value of the article contracted for has probably increased or diminished, and if this be so, neither party should be able to hold the other to a performance against the plain intent of the agreement. It is only when the sale is absolute, and the title to the property passes by the agreement, or when it is construed as a warranty, that this consequence follows. In *Russell* v. *Nicoll*, 3 Wend. 112, a contract was made in the city of New York for the sale of 500 bales of cotton, to be delivered on its arrival at New York from New Orleans, at any time between the date of the contract, February 9th, and the 1st day of June thereafter, to be paid for in cash on delivery, the cotton to be weighed, etc. This was held to be an executory contract, and the title to the cotton did not pass. It was also said that the actual transfer of the property contracted to be sold depended upon the arrival of the cotton at New York, an event not absolutely in the control of either party, and which might never happen. The period for its delivery, on condition of its arrival, was also fixed, that the parties might know how long they were to remain under the stipulations of the contract.

The difference between the construction put upon the contract by the plaintiff and defendant, appears to be this: the one interprets it without the condition and the other with it. If the sale stood upon the first sentence as entered in the plaintiff's book, and signed by both parties, thus, "I agree to take from S. T. Smith, three boat loads of coal, delivered at Waterloo, for $5 65-100, to be either egg or stove, as soon as coal is delivered from the mine from this date, July 29, 1865," he would be clearly right, and entitled to the coal when delivered from the mine. But when the condition is added, "said Neldon is to take it in boats at Waterloo, and does not bind said Smith, unless Delaware, Lackawanna and Western Railroad Company deliver the coal to him, as per offer of B. S. French's, per letter of July 11, 1865," and when that offer is of "500 tons or more for immediate delivery at $5.25, at Waterloo," he is not entitled to the coal unless there is an immediate delivery, as explained, at the price and place named.

It is not said that if they deliver at any time under the contract, but if they make immediate delivery.

The entry in defendant's book states more explicitly that the coal was to be delivered agreeable to price and conditions.

There is a mistake also in saying that the coal delivered in October and November, after the strike had ended, was delivered under the contract between Smith and the railroad company. It is true that it is so stated by Smith in his testimony, but he also calls it a compromise. The facts show that the company gave notice to Smith by a circular, dated September 27, 1865, that they canceled their obligation to deliver coal under their offer of July 11, 1865 (by mistake called therein, August 20, 1865). Smith went to their office in New York, and insisted that they were bound to deliver; the company claimed that by their terms and customs and the rules of trade, in consequence of the strike, the contract was annulled. Smith threatened to sue for damages. The price had advanced, and Smith proposed to take the difference in satisfaction of damages, and finally he says: "We came to a compromise, and he (Sykes, vice-president of the company,) ordered Mr. French to ship to me the coal to satisfy me, and satisfied my claim."

After the company failed to make immediate delivery of the coal, Smith's claim against them was for damages for non-delivery. If in settlement they agreed to enlarge the time for delivery and acceptance, it was a new contract; but it was within the statute of frauds, as it was not in writing, and could not be enforced while it remained executory: Addison on Cont., 236; *Swain* v. *Seamens*, 9 Wall. 272; *Marshall* v. *Lynn*, 6 M. & W. 109; *Moore* v. *Campbell*, 10 Ex. 323.

When the coal was accepted by a parol agreement made after the breach, it was by way of accord and satisfaction of the damages growing out of the breach of the former contract, and not a performance of that contract. There has therefore been no delivery under that contract. By this arrangement the boat load (66 2-10 tons) shipped July 18, 1865, ten days before the contract was made between Smith and the company, was accepted as part of the quantity to be delivered, and in October and November, 465 or 467 tons more were shipped and received, all for the price named in the former contract, so that both the time was enlarged for delivery and the quantity was increased more than thirty tons.

When the first boat load had been shipped from the mines, October 7th, and when the whole amount had been delivered, on November 30th, the defendant Smith was not in a position to compel the plaintiff to accept the three boat loads he had bargained for, because he had never contracted to accept the coal which might arrive under any subsequent contract, compromise and settlement, which might grow out of the non-performance of the original contract with the company. Neither can he, when the price of the coal has risen, call upon the defendant to deliver, and claim damages for non-delivery, when the defendant has received the coal long after the time named in their contract. There must be mutuality in the obligation between the parties.

This conclusion settles the rights and duties of the parties under the contract in controversy, and renders it unnecessary to express any opinion on the rulings at the trial in the admission or rejection of evidence.

The postscript at the bottom of the entry in the defendant's book, which was below the date and the signature of the parties, was excluded at the trial, on motion of the plaintiff's counsel, because it could only be connected with the writing above the signatures and date by parol proof. If it had been admitted, I think it would not have changed the result which has been reached.

It is not therefore necessary to express any opinion upon this point, and none is given. It is not within the ruling of this court in *Johnson* v. *Buck*, 6 Vroom, 338, where the papers were separate and distinct, and the attempt was to connect them by parol proof, and is not free from doubt.

The legal position of the parties was not changed by the letters and conversations between them about September 1st, giving notices and making counter claims under the contract. By its own terms it had then ended.

The verdict is set aside and a new trial granted.

BEASLEY C. J., and Justices BEDLE and DALRIMPLE concurred.

THE ST. LOUIS AND DENVER LAND & MINING CO. AND THE COLORADO COAL CO., COPARTNERS AS THE BOULDER VALLEY COAL CO. V. TIERNEY.

(5 Colorado, 582. Supreme Court, 1881.)

Construction. The following is the contract sued on: "J. F. T. to B. V. Coal Co. I do hereby contract, and hold myself responsible for the safe and prompt delivery of all the B. V. Coal Co.'s coal in the city of Denver, and to all parts of said city of Denver, and will hold myself responsible for all returns from C. O. D. orders, and all coal that may from time to time be delivered in the wrong place, so as the B. V. Coal Co. will be at no loss in any way connected with transporting of the said coal from their yard to the consumers of said coal, and that myself and all my teamsters will be always kind and accommodating to all whom they may have and do business with, for the sum of forty cents per ton, in large and small quantities, with stable and yard privileges included, for one year from June 1st, 1877, to June 1st, 1878.

"JAMES F. TIERNEY.

"*June 1st, 1877.*"

"J. F. T., Esq. I will accept the above proposition for and on the part of the B. V. Coal Co.

"By JOHN STEWART,
"*Superintendent.*"

Held, to be a contract binding upon both parties for one year, and that it was no defense to a suit for breach of contract, that the company had voluntarily discontinued the business by selling all the coal mined, at the mouth of the pit. The contract implies an obligation on the company to supply plaintiff with coal for delivery.

Ratification of act of agent. It is too late to dispute the authority of Stewart to make the contract, after accepting and paying for the services of Tierney for seven months; such acts furnish strong grounds to presume a ratification.

Evidence—Copy of contract. It is not error to admit a copy of a contract in evidence instead of the original when the contract is set out *in hæc verba* in the complaint and the answer does not deny the execution of it but only denies the authority of the agent who signed it.

Appeal from the District Court of Arapahoe County.

BENEDICT & PHELPS, for appellant.

BROWNE & PUTNAM, for appellee.

BECK, J.

The appellee brought suit in the court below against the

appellant upon a contract for the delivery of coal, alleging as a breach thereof, that on the 23d day of January, 1878, while the contract was in force, the appellant, without cause or excuse, discharged him and refused to allow him to deliver any coal under it.

The contract is as follows:

"James F. Tierney to Boulder Valley Coal Company. I do hereby contract and hold myself responsible for the safe and prompt delivery of all the Boulder Valley Coal Company's coal in the city of Denver and to all parts of said city of Denver, and will hold myself reponsible for all returns from C. O. D. orders, and all coal that may from time to time be delivered in the wrong place, so as the Boulder Valley Coal Company will be at no loss in any way connected with transporting of the said coal from their yard to the consumers of said coal, and that myself and all my teamsters will be always kind and accommodating to all who they may have any business with, for the sum of forty cents per ton, in large and small quantities, with stable and yard privileges included, for one year from June 1, 1877, to June 1, 1878.

"JAMES F. TIERNEY.

"June 1, 1877."

"J. F. TIERNEY, Esq. I will accept the above proposition for and on the part of the Boulder Valley Coal Company.

"By JOHN STEWART, Superintendent."

One ground of defense set up in the appellant's answer was, that no coal was sold and delivered in the city of Denver by the appellant during the period between January 23, 1878, and June 1, 1878.

The trial resulted in a verdict in favor of the appellee of $200. He remitted $60, and judgment was entered on the verdict for the sum of $140.

Appellee's testimony showed that he commenced the delivery of coal under the contract on the day of its date, and continued to perform the agreement on his part until the 23d day of January, 1878, when he was informed that there was no more coal for him to deliver. It likewise showed that the stipulated consideration was paid him from time to time, by the officers of the coal company, up to the latter date.

Counsel for the appellant offered to prove, in defense, "that

at no time after the 31st day of December, 1877, was there any coal shipped by the defendants' company from the company's mine (which is situated thirty or forty miles from the city of Denver) to said city, nor was any coal delivered after said time by said company in the city of Denver to consumers, nor was there, after that date, any coal belonging to said company, in said city of Denver, subject to delivery by or under the contract of said company, after the said 31st day of December, 1877, but that on the contrary all the coal mined at said mine, by said company after that date, was by said company sold at the mouth of the pit to W. H. Pierce, who paid for it at that point and shipped said coal to the city of Denver, paid the freight, and handled and had sole control and disposition of said coal after the said 31st day of December, A. D. 1877."

Objection being made, the offer was denied by the court. This offer of testimony, and the ruling thereon, raises the principal question presented by this record, which is, how is the contract to be construed in respect to the period of employment?

That the object to be attained in the construction of a contract is to discover and effectuate the intentions of the parties, and to this end that the court will adopt that construction which will bring it as near to the actual meaning of the parties as the words they saw fit to employ, when properly construed, will permit, are elementary principles of construction.

As a guide to a correct interpretation, the law also permits the subject-matter of the contract, the situation of the parties at the time of its execution, and all the surrounding facts and circumstances, to be taken into consideration.

In the case at bar the record discloses these facts: That on and prior to June 1, 1877, the appellant was the owner of a coal mine, situated in the country several miles distant from the city of Denver, and had been and was then engaged in the working of its mine, and of transporting coal therefrom by railroad to its coal yard in the city, from which it retailed and delivered the same to its customers in and about the city.

Tierney, the appellee, had been engaged in the business or employment of delivering coal, and had teams and wagons for the purpose. Under these circumstances, Tierney made

the above proposal to Stewart, the superintendent of the coal company, to deliver all its coal for the period of one year at forty cents per ton. The superintendent accepted this proposal on the part of the company, unconditionally. It thereupon became the contract of both contracting parties (assuming the power of the superintendent to make such a contract), to the same extent and effect, as if drawn in the form of an agreement by Tierney of the one part, and the coal company of the other part, and signed by both parties.

But counsel for the appellant think the judgment can not be sustained, for the reason, as they contend, that the company is not guilty of any breach of the agreement. They say there is no agreement on the part of the company, express or implied, that it will continue the business of shipping coal from the mine to its yard in Denver, and of retailing the same therefrom to consumers in the city, for one year, or for any time.

In answer to the suggestion of the opposing counsel, that the agreement to continue the business is implied, they say:

"We do not deny that covenants may be implied, and we think there is an implied covenant in this agreement, viz.: That whatever coal appellants should have for delivery to consumers in the city of Denver, during the year, the appellee should deliver and be paid forty cents per ton."

This construction is clearly untenable. No necessity exists to imply such a covenant as this. The stipulation of the contract is, that Tierney shall deliver all the company's coal, and be paid therefor forty cents per ton. A covenant can not be implied where the same subject-matter is covered by an express covenant. If counsel had said there was an implied *reservation* in favor of the appellant that it might discontinue the business at any time, their meaning would have been better expressed.

After due consideration of the language employed in this agreement, and viewing the agreement in the light of surrounding circumstances, it seems very reasonable to infer that both parties, at the time of entering into the contract, supposed that the business would continue for a year at least. The company owned the mine, and it was in successful operation; the business of shipping and retailing coal was an established

business, and there is nothing in the record to show that the project of selling the coal at the mine, or discontinuing the Denver business, had ever been contemplated.

Had the superintendent supposed that the business might be discontinued before the expiration of the year, the presumption is he would have qualified the written proposal before accepting it; and, had Tierney not intended to bind the company as well as himself, to performance for a full year, it is highly probable that the proposition would have been differently expressed.

Mr. Parsons says: "A party will be held to that meaning which he knew the other party supposed the words to bear, if this can be done without making a new contract for the parties": 2 Parsons Contracts, 499.

The superintendent of the appellant must have known from the words of the proposal that Tierney supposed it would become obligatory upon both parties when accepted, for the period stated, the one to furnish coal for delivery, the other to deliver it.

Such, therefore, being the evident understanding and intention of the parties, as imported by the language of their agreement, we are of opinion that the law implies a covenant on the part of the coal company, in the absence of an express stipulation, to continue the business for the period of time specified. This is the only construction which effectuates the intention of the parties, or gives force and effect to their agreement.

Tierney had bound himself to serve the appellant for a definite period of time, and of course, obligated himself to provide everything necessary to the performance of the service which he was to render. Had he failed to provide necessary teams, wagons and drivers to deliver all coal sold from the yard, or had he accepted other employment for his teams which rendered him unable to fill all orders for coal during any portion of the year (had the company seen fit to continue Denver business so long), would he not have been liable, under the contract, for damages occasioned by the breach?

If this be true, must not a correlative obligation have rested upon the appellant—that is, must we not imply a covenant that it would continue in good faith the business which constituted

the basis of the contract? If it be said that Tierney was bound, in manner stated, but that the coal company was left free to terminate the engagement at its option, by a voluntary discontinuance of the business which furnished the employment contracted for, leaving the contractor, as in the present instance, with teams and drivers upon his hands in mid-winter, when it was impossible to find employment for them, then the contract was unilateral. This would render it void, for want of mutuality. But the contract is fairly susceptible of a construction which will support it. This construction ought therefore to be adopted, rather than one which would defeat it: 1 Chitty Conts., 111, 112.

It is not adding anything to a written contract to imply an obligation to do what was intended at the time it was entered into, and which is essential to its vitality and force.

The necessary inference, then, is, that the appellant obligated itself to furnish appellee an opportunity to perform the contract on his part. This construction admits of the qualification, that, if the business had been suspended by acts or circumstances over which the company had no control, as by the exhausting of the coal veins, fire in the mine, or the flooding of the mine, the appellant would not be liable; but where the breach is occasioned by the voluntary act of the party, the rule is otherwise.

It is said that where a party enters into an agreement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he will not, of his own mere motion, do anything to put an end to that state of circumstances under which alone the agreement can be operative: 1 Add. Cont., Sec. 236; 1 Chitty Cont., p. 89; *Stirling* v. *Maitland*, 5 Best & Smith, p. 840.

The state of facts proposed to be proved by appellant on the trial showed a voluntary discontinuance of the business on the part of the company, by a sale at the mouth of the pit of all the coal mined. These facts will constitute no defense to the action and were properly rejected.

In support of the foregoing views we cite the following authorities: *Stirling* v. *Maitland*, 5 Best & Smith, p. 840; *Whittle* v. *Frankland*, 2 Best & Smith, p. 49; *McIntire* v.

Belcher, 14 Common Bench (N. S.), p. 653; *Emmons* v. *Elderton*, 4 House of Lords' Cases, p. 624; *Black* v. *Woodrow*, 39 Md. 194; *Allaman* v. *The Mayor, etc.*, 43 Barber, 33.

In regard to the other errors assigned, we are of opinion that no error occurred of sufficient importance to justify a reversal.

As to the authority of Stewart, the superintendent, to bind the company, we are disposed to agree with counsel for appellee, that it is too late to say that the company had no knowledge of the contract.

Tierney continued to execute it in accordance with its provisions for a period of more than seven months, during which time the officers of the company also performed it by permitting Tierney to deliver all the company's coal, and by paying him regularly the stipulated compensation. If authority on the part of the superintendent to make such a contract for the company was wanting, the long time during which it was executed by both parties, and the manner of its execution on the part of both, furnish strong grounds to presume a ratification.

As to the introduction of a copy of the contract in evidence instead of the original, it is sufficient to say that no issue was tendered by the pleadings as to the execution of this contract. It was set out *in hæc verba* in the complaint, and the answer only denies the authority of the superintendent to execute it on the part of the company. That he did execute the contract declared upon is therefore admitted.

Finding no substantial error, the judgment will be affirmed.

Judgment affirmed.

Chief Justice ELBERT did not sit in this case.

1. Contract between mine operator and coal dealer, *held*, to be controlled by proof of usage as to amounts and time of delivery; and that under a general contract to deliver coal, the purchaser had no right to demand at once a gross shipment which would take all the shipper's coal to the inconvenience of all his other customers: *Oakman* v. *Boyce*, 100 Mass. 477.

2. There is no implied warranty of quality on sale of coal; on a general order would be presumed "the current product of the mines": *Warren* v. *Philadelphia Co.*, 83 Pa. St. 437.

3. Correspondence between railroad and coal mining company, resulting in expenditures for transportation by the mine and the hauling of its coal for some time at a certain rate, construed to be a revocable license, allowing increase of freight, notwithstanding the expenditures by the mine owner for rolling stock: *Baltimore & O. R. R. Co.* v. *Potomac C. Co.*, 51 Md. 329.

4. Dangerous character of slack coal considered with reference to sea shipments: *1,100 tons of Coal*, 12 Fed. 185.

See COLLIERY.

The Hazleton Coal Co. v. The Buck Mountain Coal Co.

(57 Pennsylvania State, 301. Supreme Court, 1868.)

Contract between mining company and transporting company. The defendants agreed to build a railroad communicating with the plaintiffs' mines, and to furnish the plaintiffs "the same transportation facilities and charge them the same price per ton for coal as they may or shall at the same time charge for tolls and transportation," etc., between other named points. The plaintiffs in consideration agreed to furnish the defendants all the coal they should mine to the amount of 1,000,000 tons, and not less than 600,000 tons in eight years, and pay to the defendants 2¼ cents per ton till the sum should reach $9,000, as security for their covenants. This was a covenant by the defendants to receive and transport all the coal the plaintiffs should mine and offer to them for transportation, not exceeding the contract limit; and to do this in the same manner and with the same diligence they should do for others, but not limited in quantity by the proportion of others: Agnew, J., at Nisi Prius.

Incidental terms implied. As to that which is not expressed in a contract but must be implied, such as the time, manner and quantity of coal delivered, the law fixes a reasonable measure of performance which is to be regulated by the usual course of business: *Id.*

Quantity to be carried. The plaintiffs while pursuing their mining operations in a reasonable and proper manner were entitled to transportation for all the coal they mined and offered: *Id.*

Relaxation of terms by consent. If parties mutually adopt a mode of performing their contract, differing from its strict terms, or if they mutually relax its terms by adopting a loose mode of executing it, neither can go back on the past and insist upon a breach because it was not fulfilled according to the letter. He may require a return to the terms in future: *Id.*

Measure of damages where there is no market. As there was no general market of sale for coal at the point of delivery, the measure of damages would be the price of coal in the market of sale, less the expense of putting the coal into market from the point of delivery, and the cost of mining and preparing the coal and transporting it to the point of delivery: *Id.*

Damages for shutting down work at mines. If the defendants by refusing to furnish transportation, compelled the plaintiffs to desist from mining up to their reasonable production capacity, damages might be allowed for what would be the loss they suffered on the reasonable amount they were in due course mining: *Id.*

Proof of unfair motive. Proof of a motive to unfairness corroborates the proof of unfairness, and renders it more credible: *Id.*

Abrogation of mutual contracts. In mutual contracts one part is not to be abrogated or impaired by another, when that has an appropriate meaning which satisfies the words.

Examination and construction of a contract with mutual covenants for furnishing and transporting coal.

February 20th and 21st, 1868. Before THOMPSON, C. J., STRONG, AGNEW and SHARSWOOD, JJ. READ, J., at Nisi Prius.

Certificate from Nisi Prius: No. 179, to January Term, 1867.

This was an amicable action of covenant in which The Buck Mountain Coal Company were plaintiffs, and The Hazleton Coal Company were defendants. The covenant on which the suit was founded was contained in an agreement between the parties made November 4, 1862, in which the defendants "agree to construct, at their own cost, a good and substantial single-track railroad, with all the necessary switches, turnouts, sidings, etc., for the purposes of a coal road, from the present chutes or stocking ground of The Buck Mountain Coal Company, at or near the town of Clifton, in Carbon county, to the railroad of the said Hazleton Coal Company, and to connect the same with their said railroad at a point near the Beaver Meadow Junction, and to have the said railroad finished and completed not later than the 1st day of June, 1863, or as soon thereafter as practicable. The Hazleton Coal Company further agree to furnish the same transportation facilities, and charge them the same price per ton for coal as they may or shall at the same time charge for tolls and transportation of coal per ton from the Lehigh Luzerne Junction to Penn Haven (the distance being about the same, say ten miles.)

In consideration, etc., the Buck Mountain Coal Company agree to furnish for transportation over said railroad, all the coal that they may mine, until the quantity furnished shall amount to 1,000,000 tons; and, as a guaranty that not less than 600,000 tons of coal shall be mined and offered for transportation within eight years from the time of the completion of the said railroad, the said Buck Mountain Coal Company agree to pay to the said Hazleton Coal Company 2¼ cents per ton on the first 400,000 tons of coal that may or shall be

transported over said railroad from Clifton to Penn Haven, for the purpose of creating a fund of $9,000, to be held by the Hazleton Coal Company as a collateral security for the furnishing of the said 600,000 tons of coal for transportation within the eight years as before mentioned. It being understood and agreed between the parties, that the Buck Mountain Coal Company shall have a credit or allowance of time for all unavoidable delays or interruptions by which their shipments may or shall be decreased or suspended, so as to prevent them from furnishing for transportation the stipulated quantity of 600,000 tons of coal in the eight years. And if the said Buck Mountain Coal Company fail to furnish the said 600,000 tons of coal for transportation, as before mentioned, the Hazleton Coal Company are to keep and appropriate the said $9,000, or so much of it as they may have in hand, and the interest on the same, to their own use, etc. But should the Buck Mountain Coal Company furnish for transportation the 600,000 tons of coal in the time named (with the credit or allowance of time for detentions as stipulated), the Hazleton Coal Company covenant to refund the $9,000, with interest, etc.

It being agreed that the Buck Mountain Coal Company will take up all the iron from their present railroad between Rockport and Clifton, previously to the completion of the said railroad to be built by the Hazleton Coal Company; and that the Buck Mountain Coal Company shall construct at their own cost all the necessary chutes, screens and fixtures at Clifton, for the purpose of preparing and loading of coal into cars on the railroad to be built as aforesaid by the Hazleton Coal Company.

The declaration contained five counts; the breach alleged in the first was that the defendants did not construct the railroad on the 1st of June, or as soon thereafter as practicable; in the second, that they did not make the necessary switches, turnouts, sidings, etc.; in the third, that they did not "furnish to the plaintiffs the same means of transportation for said coal as were furnished by the defendants to other persons sending coal over the road of the defendants from the Lehigh Luzerne Junction to Penn Haven;" in the fourth, that they did not furnish the plaintiffs with the same transportation facilities and at the same rate or price as they did to other

shippers of coal, etc. The breach laid in the fifth count was substantially the same as that in the fourth.

At and before the date of the contract, the Hazleton Company owned a railroad from near Hazleton—where they owned a large body of coal-land—connecting with the Lehigh Valley Railroad at Penn Haven. About seven miles west from Penn Haven, at Beaver Meadow junction, this railroad connected again with the Lehigh Valley Railroad, and three miles further west it was intersected by the Lehigh Luzerne Railroad. The Hazleton Company's mines, and the Hazleton and Lehigh Luzerne Railroads for many years had been leased to A. Pardee & Co. The Hazleton Company owned no rolling stock, except 129 coal cars, which also were leased to Pardee & Co., and five old locomotive engines which were not used for transporting coal. There were a number of other companies engaged in transporting coal over the Lehigh Valley Railroad. The defendants appear to have received their stock of cars from the Lehigh Valley Company, and to have distributed them *pro rata* to the different companies transporting coal from the Hazleton region.

Before the date of the contract the Buck Mountain Company had transported their coal by their own railroad from their mines to Rockport, on the Lehigh, whence it was shipped by the Lehigh navigation. Clifton is a point on this road. The great flood of 1862 destroyed the Lehigh navigation, the only means by which the Buck Mountain Company could reach market.

The plaintiffs entered into the contract in question to furnish an outlet for their coal. The breach principally relied on was, that the defendants did not furnish to the plaintiffs the facilities for transporting their coal which they had covenanted to do. The plaintiffs claimed that the defendants were bound to furnish them *absolutely* a sufficient number of cars to transport the amount of coal agreed to be transported over the defendants' road. The defendants alleged that they were bound to furnish cars only *pro rata* with other companies using their roads, to be measured by the amount of coal produced from the respective mines.

On the trial the plaintiffs offered to prove the profits per ton on coal in 1863, 1864 and 1865, for the purpose of damages,

and as bearing on the question of the motives of the agents of this company in violating the contract; to be followed by proof that defendants leased the road. This was objected to by the defendants, admitted by the court, and a bill of exceptions sealed.

The testimony was very voluminous, but what is above stated, and the portion of the charge of the court given below, will sufficiently exhibit the questions involved.

Judge Agnew charged:

"We have now reached the disputed clause—the same transportation facilities; the defendants alleging this to mean the same *proportional* facilities they furnish to other collieries. Let us suppose the writing to be under consideration before it is yet signed, and to be read down to this clause. The plaintiffs stop the reading and inquire—what do you mean by the same transportation facilities? You do not state what they are. The tolls and charges we understand. They are to be the same as you charge others from the junction to Penn Haven; but what are the transportation facilities you refer to as the same which you are to furnish us? Suppose the defendants reply—Well, they are to be in the same proportion to the whole of our rolling stock, as the productive capacity of your mines bears to the aggregate production of all the mines sending coal over our road. The answer to this would have been immediate: That will not do—it is inconsistent with our mutual undertakings. You have bound us to mine and offer for transportation on your road not less than 600,000 tons in eight years, which will average 75,000 tons a year; now, if your transportation stock is insufficient for the whole trade, our proportion may not enable us to offer, or you to receive for transportation, the number of tons you have bound us to furnish, and you will thus deprive us of the $9,000 we stipulate to put in your hands as a security that we will furnish you that quantity. The percentage of cars thus apportioned to us might not be sufficient to carry off more than 50,000 or 60,000 tons per annum. We can not conduct our mining operations profitably in this way. With such a reading of the terms—"same transportation facilities"—the parties must have stopped. The restriction was not only at variance with the profitable mining of the plaintiffs, if the pro-

portion of cars should fall far short of their wants, but would also diminish the tolls over the new road representing so much capital expended in its construction. It collides directly with the understanding of the defendants to furnish the plaintiffs transportation for *all the coal mined and offered*, and with the plaintiffs' obligation to furnish a certain quantity in a given time. This can not be the true sense of the language used.

"But if the defendants had said, in answer to the question, what facilities do you mean? we mean that we will furnish the same kind we do to others coming from the junction to Penn Haven—that is, as good cars, that will hold as much, and take them to you and bring them away with the same diligence that we serve them—the agreement would then have been signed at once. This is the true meaning of the contract, as drawn from the words of the special clause; not by cutting out a word or by rejecting the whole clause, but by interpreting it with the context, and the intention of the parties gathered from the four corners of the instrument. The defendants agreed to receive and transport all the coal the plaintiffs should mine and offer to them for transportation, not exceeding the contract limit; and to do this in the same manner and with the same diligence they should do for others, but not limited in quantity by the proportion of others. The time and manner of doing this, of course, was subject to the usual and ordinary course of mining operations. As to that which is not expressed in a contract, but must be implied, such as the time, manner and quantity of coal delivered, the law fixes a reasonable measure of performance, and that it is regulated by the usual course of the business. The plaintiffs could not, by crowding and driving their mines, accumulate an extraordinary stock, and demand an immediate transportation. Nor could the defendants push over the transportation into particular seasons to accommodate themselves, or the bulk of the 600,000 tons to the latter part of the period of eight years.

"But the plaintiffs, while pursuing their mining operations in a reasonable and proper manner, were entitled to transportation for all the coal they mined and offered.

"The only doubt I have had upon this clause in the con-

tract has arisen from the constant practice of the defendants, through Pardee & Co., to regulate the transportation by a *pro rata* distribution to all the mines. But this is removed by several considerations. First, there is no evidence that the defendants are under the contract duties to others. As to other collieries, therefore, they must adapt their regulations to their legal duty to them. As to them, it was proper to make a *pro rata* distribution, according to their tonnage. No fault, therefore, could be found with the adoption of this general rule. But to apply the rule to the plaintiffs is to take them out of their contract relation, and impinge upon its terms, which are at variance with such a rule of distribution. In the next place, there is no evidence of any express agreement to vary the contract and to adopt the *pro rata* mode of distribution. And, finally, there is the evidence of dissatisfaction existing about the amount of transportation furnished. I do not see, therefore, how the mode of distributing the cars can be made to bear successfully on the interpretation of the agreement. How the contract was actually executed between the parties, or whether the *pro rata* mode of distribution was accepted by the plaintiffs is a different question—to be left to the jury on the evidence.

"Three breaches of the contract have been assigned:

"1. For not building the road in time.

"2. For not making sufficient sidings.

"3. For not furnishing sufficient transportation facilities.

"The contract required the railroad to be finished and completed not later than the 1st of June, 1863, or as soon thereafter as practicable. If difficulties arose from the state of the weather, or the condition of the ground, or other unavoidable causes, the defendants had a reasonable practicable time to finish after the first day of June. Was the work retarded until after the first day of June by unavoidable causes? If so, did the defendants finish in a reasonably practicable time after that day? If not, the plaintiffs would be entitled to recover such reasonable damage, arising directly from the delay, as the jury may find upon the evidence.

"The next breach is as to the sidings. The jury will determine whether there was any breach of this part of the agree-

ment, and if they find it, allow the damages shown by the plaintiffs to have resulted to them directly from the injury.

"The 3d breach is the important one, and is the real ground of controversy. The jury, taking the interpretation of the agreement from the court, will, therefore, inquire and determine from the evidence whether the plaintiffs, in the usual course of mining, mined and offered to the defendants or their agents for transportation, in reasonable quantities and at reasonable times, coal which the defendants did not or would not transport from their mines to Penn Haven. In considering this question the jury are instructed that the defendants were bound to transport all the coal offered to them for transportation by the plaintiffs in this reasonable manner, and could not confine them to a *pro rata* distribution of cars, in a proportion founded on the average production of other collieries using the road, unless the plaintiffs consented so to receive it.

"Under the contract, the coal was to be furnished at the mines and transported thence. For this purpose the defendants were to build the tracks, sidings, etc., while the plaintiffs were to erect the machinery, etc., for loading into the cars. The evidence shows that the loading is done at the breaker, and if the cars are not sent there to take away the coal, the breaker, baskets, etc., fill up, mining cars cease coming, and finally the mines are blocked up. It was the duty of the defendants to send a sufficient number of cars when they were informed that they were needed at the mines, and not for the plaintiffs to carry the coal to them. If, therefore, the plaintiffs had coal mined lying at their mines, and demanded cars for its transportation, which the defendants failed or refused to furnish, this would be a sufficient offer under the contract.

"There is no evidence, that I remember, of any specific offer at a particular time of a given amount of coal for transportation, and a refusal by the defendants thereupon to transport such amount. But there is evidence, consisting of facts and circumstances, tending, as it is alleged, to prove that the plaintiffs had coal mined and ready for transportation, and made requests for transportation of the defendants, and that defendants declined to furnish it beyond a given percentage of cars fixed by them as the only number they would furnish.

The plaintiffs gave evidence to show to the jury, who must judge of it, that their mines became blocked up, and that their works stopped from time to time from a want of cars; that they kept a book of stoppage for this reason, made out a statement of lost time, and presented a bill for it to the defendants—that the loaded tracks were sometimes full—that they need 75 to 80 cars a day, but frequently got only 20, 30, 40, 50 and 60 cars a day; that the mines were not worked up to their capacity from a want of cars; that there were not cars enough on the whole road to do all the business of the various collieries; that the defendants fixed the plaintiffs' transportation—not by the product of their mines, but by a *pro rata* founded on the whole business of the road; that this *pro rata* was reduced from time to time, and especially on account of the opening of new mines by other parties; that complaints were made by plaintiffs to defendants and their agents, both verbally and in writing, and requests made for transportation, and no response except that they had their just *pro rata*. Opposed to these allegations, and contradicting the idea that the plaintiffs were mining and offering their coal upon the basis of a strict performance of the transportation clause of the agreement and according to its letter, is all the evidence which tends to show, as the defendants allege, that the plaintiffs acquiesced in the mode of distributing the cars by a *pro rata* percentage. It is alleged that both the written and oral evidence of the plaintiffs—of complaints of insufficient transportation—was confined to these complaints; that the *pro rata* was not assigned upon a proper basis of measurement of the several mines and a correct calculation of the percentage, and that Connor, the distributing agent, was partial and unfair in his distribution. It is alleged that the evidence does not show any complaint that sufficient transportation was not furnished for all the coal mined and offered by the plaintiffs, but that it shows that plaintiffs did not exact a strict and literal performance, and in its execution adopted the mode of performance practiced by the defendants.

"The jury will take the evidence all together and look on both sides, and from the whole determine what mode of performance the plaintiffs offered, and what mode they accepted. If the parties mutually adopt a mode of perform-

ing their contract, differing from its strict terms—as if by a contract wheat is to be weighed, and it is accepted by measurement—or, if they mutually relax its terms by adopting a loose mode of executing it, neither party can go back upon the past and insist upon a breach because it was not fulfilled according to its letter. He may insist upon a different mode of observing it in the future, and require a return to the terms of the contract. This is the doctrine of *Forsyth & Brothers* v. *North American Oil Co.*, 3 P. F. Smith, 168, and, no doubt, of other cases to be found in the books. Parties often have good reasons for deviation or relaxation, and it would be most inequitable, if, understanding each other, one, after leading the other to rely upon his having performed his contract duty, should fall back upon him for damages for non-fulfillment according to the letter.

"If, in this case, the plaintiffs accepted the *pro rata* mode of distributing the cars as the measure of performance, and accepted the number thus assigned them from time to time, and if their complaints were not of the mode of ascertaining the number allotted to them, but because it was not made upon what they believed to be a proper basis of measurement of the mines, or made upon an incorrect calculation of the tonnage, or because of a supposed unfairness in the agent distributing them, they can not now turn back and complain of the *pro rata* mode adopted. If, on the whole evidence, the jury believe that the plaintiffs in fact got their fair proportion of cars under the mode of distributing them, it is too late to say it was not a literal compliance with the contract. If the jury should find that the defendants failed to transport the coal offered to them under the contract, the damages would be the loss the plaintiffs suffered on the coal thus ready and offered for transportation. This loss would be the difference between the cost of mining, preparing and transporting the coal to Penn Haven and the price it would have brought there. This is the direct and immediate consequence of the defendants' breach of their contract. The defendants had the exclusive control of the transportation. The plaintiffs had no other route to Penn Haven to avail themselves of and to reduce the loss to the difference in cost of transportation. The plaintiffs being confined to this route, and yet denied it by the defend-

ants' refusal to transport, the direct loss is the difference between the cost of the coal at Penn Haven and the price it would bring there, or, in other words, the profits. I say Penn Haven, because it is the terminus of the Hazleton road, and of the shipment under the contract. But the jury will remember, and no doubt be satisfied on the evidence, that the actual shipments did not end there—the coal being carried by mining arrangements with other roads to markets further off, and there was probably no general market for the sale of coal at Penn Haven. The jury would, therefore, have a right to take the price of the coal in the market of sale and to deduct from this the cost of transportation from Penn Haven, and expense of putting the coal in the market, in order to find a fair price at Penn Haven, and from this deduct the cost of mining and preparing the coal and of transporting it to Penn Haven. But beside the coal actually mined and ready for transportation, if the defendants refused to furnish sufficient transportation, and thereby compelled the plaintiffs to desist from mining up to their reasonable productive capacity, this would be an injury for which damages may be allowed. If, by the defendants' breach of their contract and failure to furnish the necessary transportation, the plaintiffs became unable to mine, because of the blocking up of their mines, so that the production must cease from a want of cars to take it away, the defendants can not set up the consequences of their own breach as a defense, and resist a recovery, because the coal could not be mined and offered to them. The injury of the plaintiffs would be the loss they suffered on the reasonable amount of coal they were, in due course of mining, able, ready and willing to mine and offer for transportation, had they not been prevented by the defendants' act from doing so. To the extent of this breach of the defendants in failing to furnish cars beyond the number they did furnish, if so found by the jury, the plaintiffs would be entitled to a fair and reasonable sum in damages—what the jury can properly find, on all the evidence, as a compensation for the reasonable amount of coal they were thus prevented from mining.

"Evidence was received as to the relation of Pardee & Co., the lessees of the road, and the motives of themselves and their agents to make an unfair distribution of the rolling stock.

The competency of this evidence was reserved. I now say to you that it is competent in my judgment. The defendants disabled themselves from executing their contract with the plaintiffs, directly or personally, by putting their road wholly into the possession and control, as to transportation, of Pardee & Co. They also leased to them their mines. By the act of the defendants, Pardee & Co. became sole instruments of carrying into effect this contract with the plaintiffs, and yet were also made by the lease competitors for transportation. There was a direct interest in the control of the transportation adverse to that of the plaintiffs. In controlling that transportation, the proof tends to show that Pardee & Co. exercised it by a percentage of distribution not founded on the contract right of the plaintiffs, but on a supposed equality of proportion belonging to all the mines, and that this proportion was varied from time to time, sometimes reducing the plaintiffs' *pro rata* to suit the alleged general demand for facilities. Now, the proof of a motive to unfairness corroborates the proof of unfairness, and renders it more credible. If to the proof offered to establish unfairness and inequality of distribution, you add a selfish motive to carry the cars to the mines of Pardee & Co., it certainly strengthens the credit to be given to the former.

"But while I thus instruct you upon the legal competency of such evidence, I am far from saying as a question of fact, that my mind is satisfied that Pardee & Co. were actually influenced by these selfish considerations to act unfairly. On the contrary, the evidence impresses me favorably toward them, that they endeavored to act impartially, but that their error consisted in an erroneous construction of the contract, leading them to apply to the plaintiffs a general and equitable rule of distribution, but one not consistent with the rights of the plaintiffs under their contract.

"I have now given to the jury the necessary legal instruction. I have not referred to the evidence specifically, preferring to let the jury decide for themselves. In order to enable the jury to make a proper application of the facts, it was necessary to state those that are relied on to prove the breach of contract; but whether these facts are established in the proof, and whether, if fully proved, they justify the conclu-

sions drawn from them, are matters for the jury, whose province it is to determine the facts and draw the proper conclusions under the legal instructions given. The jury will now take the case and decide it.

"The evidence that Mr. Jenks said if the defendants would furnish him transportation to comply with certain contracts, he would forgive the past, depends on how the jury shall find the facts. If it was intended as a contract which the plaintiffs authorized Mr. Jenks to make, in consideration of some advantage which plaintiffs would gain by the arrangement, and which the defendants assented to, to procure a settlement of their past difficulties, it would be a contract, and operate as a release. But if it was no more than the expression of the feelings or disposition of Mr. Jenks, it would not be a contract. And the jury should consider whether any new consideration arose, or whether the plaintiffs gained any more than their contract rights. The facts must evidence a contract, otherwise they go like other facts in the cause, in relation to the conduct of the parties in carrying out the agreement."

The verdict was for the plaintiffs for $39,388.

The defendants took a writ of error, and assigned for error the admission of the evidence mentioned in the bill of exceptions and the charge, in a number of specifications.

F. B. Gowen and F. Sheppard, for plaintiffs in error.

No implied covenant to furnish cars can be drawn from the contract: Platt on Covenants, 40, 45; Noke's Case, 4 Rep. 80; *Line* v. *Stephenson*, 4 Bing. N. C. 678; *Kent* v. *Welch*, 7 Johns. R. 258; *Vanderkarr* v. *Vanderkarr*, 11 Id. 122; *Weems* v. *McCaughan*, 7 S. & M. 422; *Morris* v. *Harris*, 9 Gill. 19. It is the legal duty of a railroad to treat all its customers alike: *Nicholson* v. *The Great Western Railway Co.*, 5 C. B. N. S. 366; *Oxlade* v. *The North Eastern Railway Co.*, 1 Id. 454. If the terms of a contract are ambiguous, the usage of the parties becomes an important element in its construction: *Coleman* v. *Grubb*, 11 Harris, 393; *Lehigh Coal and Navigation Co.* v. *Harlan*, 3 Casey, 430. As to the measure of damages: *O'Conner* v. *Forster*, 10 Watts, 418; *Bracket* v. *McNair*, 14 Johns. 170; *Lentz* v. *Choteau*,

6 Wright, 435; *McKnight* v. *Ratcliff*, 8 Id. 156; *Brown* v. *Foster*, 1 P. F. Smith, 165; *Fleming* v. *Beck*, 12 Wright, 309. The time for which the contract was to run had not expired, and the action is prematurely brought: 2 Pars. on Cont. 517.

R. C. MCMURTRIE and C. GUILLOU, for defendants in error.

There is no express covenant to override the implied agreement to furnish cars: *Woolley* v. *Reddelien*, 5 M. &. Gr. 316; *Wood* v. *Copper Miners*, 7 C. B. 906; *Pilbrow* v. *Pilbrow*, 5 Id. 440. Extraneous facts may be looked at to ascertain whether there was an implied covenant to carry: *Simpson* v. *Margitson*, 11 Q. B. 32; *Turner* v. *Evans*, 2 E. & B. 516; *Elliott* v. *Turner*, 2 C. B. 446; *Osborn* v. *Wise*, 7 C. & P. 761; *Bainbridge* v. *Wade*, 16 Q. B. 98; *Snyder* v. *Leibengood*, 4 Barr, 305; Wigram on Ev. 83. A contract is not to be construed by the usage of the parties: *Coleman* v. *Grubb*, 11 Harris, 394; *Lehigh Co.* v. *Harlan*, 3 Casey, 439. A breach of the covenant has already occurred: *Emmens* v. *Elderton*, 13 C. B. 495; *Campbell* v. *Gates*, 10 Barr, 483; *Clark* v. *Marsiglia*, 1 Denio, 317; *Wilson* v. *Martin*, Id. 602; *Lush* v. *Russell*, 4 Exch. 637; *Goodman* v. *Pocock*, 15 Ad. & E. (N. S.) 576.

The opinion of the court was delivered, May 7, 1868, by AGNEW, J. The true interpretation of the transportation clause in the contract between these parties, is the only important question in this case. It alone was argued and relied upon, and its decision is all that is required. The agreement was executed on the 4th of November, 1862; but the transportation part of it was not to take effect until June, 1863, when the road was to be finished. The substitution of A. Pardee & Co., in the meantime, on the 24th of December, 1862, as lessees both of the mines and the transportation, whose interests would conflict with those of the plaintiffs, was the exercise of a power bearing on the question of interpretation. The leading features of the contract, on part of the plaintiffs, are these: They agreed to build the fixtures, to prepare and load their coal into the cars on the defendants' railroad, "to furnish for transportation all the coal they may mine until the quantity furnished shall amount to one million tons," "of which quantity not less than 600,000 tons shall be

mined and offered for transportation within eight years from the time of the completion of the said railroad." As a collateral security for the furnishing of said 600,000 tons for transportation, by the Buck Mountain Coal Company, within the eight years as before mentioned, they were to pay into the hands of the defendants a certain rate per ton, amounting to $9,000, which the defendants were to "keep and appropriate," "if the said Buck Mountain Coal Company fail to furnish the said 600,000 tons of coal for transportation, as before mentioned." As a further security, the plaintiffs were "to take up all the iron from their old or present railroad between Rockport and Clifton, previous to the completion of the said railroad." Now, on these covenants, no one can doubt that the plaintiffs were bound to furnish to the defendants, for transportation, not less than 600,000 tons of coal in eight years, and had the right to furnish as much more as would make one million of tons. But this must be done according to the legal effect of the covenant, to wit, in the usual and ordinary course of mining operations. The plaintiffs being thus bound, the correlative duty of the defendants to transport the coal is not to be doubted, and, indeed, is conceded. Now, this duty can be overcome only by a plain and express covenant which limits or qualifies it. Where, in this agreement, do we find any plainly and fairly expressed covenant which limits the duty to transport the coal thus mined and offered, and substitutes for it a *pro rata* or percentage of transportation in the proportion that the product of the plaintiffs' mines bears to the product of all the mines of that region sending coal over the defendants' road? That no such express covenant as this can be found in the agreement is beyond dispute. Neither the number of cars nor the idea of proportion is expressed anywhere in the writing. If it exists at all it must be found only in the following covenant: "The Hazleton Coal Company further agree to furnish the same transportation facilities, and charge them the same prices per ton for coal as they may or shall at the same time charge for tolls and transportation from the Lehigh Luzerne Junction to Penn Haven (the distance being about the same, say ten miles)." What does this language fairly import? What will fully and fairly satisfy the meaning of the words? Now, it is a cardinal rule of the interpretation of mutual contracts, that you are not to ab-

rogate or impair one part of a contract by another, when that other has an appropriate meaning which fully satisfies the words. To understand this covenant, we must remember that the branch road runs from the main stem to Clifton, and that the Lehigh Luzerne Junction lies west of the branch about as far as Clifton lies from the main road, while all of the other collieries lie beyond the junction. Now, everything in the interpretation of this covenant rests upon the word "same." The same as what? The same transportation facilities and the same charge for tolls and transportation between Clifton and Penn Haven, as between Lehigh Luzerne Junction and Penn Haven. Why? The agreement answers. The distance being about the same, say ten miles. Clifton was omitted to be named, but the reference to the distance plainly supposes it as the object of comparison. The reason was obvious; Clifton being about the same distance from Penn Haven as the junction, the junction was fixed upon as the measure of the rights of the plaintiffs under the covenant. The plaintiffs were therefore to have the same transportation facilities from Clifton to Penn Haven as the company used from the junction to Penn Haven. The cars were to run as often and as regularly from Clifton to Penn Haven as from the junction to Penn Haven. They shall be as timely to bring away and take back cars. The cars shall be as capacious and serviceable; there shall be the same kind of cars, canal and railroad. In short, the branch road to Clifton shall have the same transportation facilities as exist on the main road to the junction, and the same charges for tolls and transportation.

Now here is a plain and clear meaning consistent with the words of the covenant, filling them completely without impairing the duty arising out of the other part of the contract. The agreement does not undertake to regulate the number of the cars for the plain reason that the number was indefinable, being dependent on the quantity of coal to be mined in the usual course of operations, between the minimum and maximum fixed in the contract. But suppose we extend the meaning of the word "same" so that it shall compare persons instead of places, and the covenant shall read, "the same number of cars as we furnish any other party between the junction and Penn Haven," what is gained? According to every correct rule of interpretation of the covenant in favor of the covenantee, this would

give the plaintiffs the highest number of cars furnished to any other party, to wit, twenty-nine cars where they got but eleven, and twenty-five where they got but seven. In order to get below the highest number given to any other party, you must extend the meaning of "same" still further, so as to introduce into it also the idea of proportion. But the idea of such a proportion is to be found nowhere in the contract, expressly or impliedly, and is both impracticable and unfair, as I shall now show.

A *pro rata* is founded upon the productive capacity of all the mines of that region dependent on this road. This is to be ascertained either by measurement, or by actual results. Two weeks were spent in the endeavor to prove both, and with no satisfactory result. The number of slopes, gangways and breasts of a colliery being given, no certainty follows, for still its product depends upon the pitch of the vein, its thickness, hardness, intervals of slate and faults. Owing to these circumstances, the proof was that the daily product of a miner will vary from four to fifteen and even twenty tons. Then the hoisting power is often not in proportion to the productive capacity of the mine. One witness testified that in a given time in his mine six hundred mine cars could be sent from the breasts to the bottom of the slope, while the hoisting power could raise but three hundred in the same time. Then follows the hauling to the breaker, involving the elements of distance, inclination and power. After this the capacity of the breaker, pockets and chutes. Disproportions exist in every colliery, which must all be taken into account for actual measurement. Then come the length of the siding, and the standing room for the cars. The effect of this is thus illustrated. We were blocked up (said a witness) with loaded cars when the engine did not come regularly. When the pockets were full we would lie idle. The men would not go into the mines for less than half a day's work. Lost one day out of three from a want of cars and by being blocked up with full cars. The end is not yet; now come the deductions for unavoidable delays and interruptions incident to mining operations, such as accidents to the mines and machinery, and the refusal of the miners to work, caused by funerals, holidays and strikes. The testimony of Calvin Pardee on this point was that he counted forty weeks as a year's work. It is to these delays and interruptions the covenant applied to allow the plaintiffs credit

for time lost out of the eight years in which the 600,000 tons of coal were to be furnished. It was not to the failure of the defendants to furnish transportation. That itself was a sufficient excuse, but the covenant for credits was for the benefit of the plaintiffs to prevent injury by these delays. When we consider these discordant elements, it will be seen that measurements of all the mines for a *pro rata* is practically a delusion. An attempt was made at one time at what were termed trials to ascertain the productive capacities of the mines, by giving them all the cars that could be furnished for a given space of time, but it proved abortive. The next resort was to actual shipments as shown by a table. But this was, if any thing, more unsatisfactory, for the shipments depended on the *pro rata* of cars supplied, of which every colliery complained. Markle, a brother-in-law of Pardee, who regulated the transportation, says, I don't think two days passed without complaining, till I got tired of it. I don't think an operator in the region complained with more bitter feeling, for I felt we were wronged. The effect of the *pro rata*, when a sufficient number of cars was not supplied, was this: the breakers and pockets filled, the hoisting ceased at the slopes, the mine cars ceased to run, and the miners had to stop. The mines could not ship the coal they were able to produce, and hence a *pro rata* founded on shipments was esteemed unfair. Of course if the plaintiffs bound themselves to accept a *pro rata* they can not complain; but this is the very question, did they bind themselves to such a rule. Now in performing the mere legal duty to the public a *pro rata* founded upon any reasonable data would be sufficient to justify the defendants in distributing their cars according to such a *pro rata*. But here the question arises upon a contract, and the question is whether it is reasonable to suppose the plaintiffs, having bound themselves to perform their covenants for a specific quantity of coal under a penalty, agreed to commit themselves to a *pro rata* dependent upon the will of the opposite party, and that party a rival in the same trade. It is also unreasonable in another aspect; in subjecting the plaintiffs to a sliding scale constantly tending downward. This is proved by a *pro rata* table from August 5, 1863, to October 29, 1866. Thus the *pro rata* or percentage of the

plaintiffs ran down from 11 to 7 per cent., while the defendants' collieries ran down from 29 to only 25 per cent. East Sugar Loaf ran up from 14½ to 15 per cent.; Harleigh from 5½ to 6; Zeddo 14½ to 16; Ebervale 5½ to 9, and Milnesville 4½ to 6. The idea of proportion not being found in the writing, it is, therefore, unjust to give to the word "same" this extended interpretation, when the word is fully satisfied by a proper and wholesome meaning not destructive of the duty cast upon the defendants by their contract. It submits the plaintiffs to the discretion of the defendants; it has no adequate means of ascertainment; it is a shifting rule; it diminishes the plaintiffs' demands as certainly as new collieries are opened and others increased. It is not interpretation but addition to the writing to give it this meaning.

But it is argued that to give the plaintiffs more than a *pro rata* is illegal. This was answered by saying that the charter of the defendants was not compulsory. I think there is another answer. It is not unfair and therefore not illegal. The road to Clifton is a new road, a branch. The right of the defendants to build it is not denied, while the terms of the contract to effect its construction belong to their own discretion. The purpose was beneficial to the covenantor and to themselves and warranted their covenant to furnish the necessary transportation upon it. If they had no right to divert any of the rolling stock then on the road beyond the junction, they were bound to add to their stock a number sufficient to stock the branch. If they could divert to it no more than a *pro rata*, they had a right to add still to this number so many as would make up the number required for this branch, and to appropriate to it exclusively this additional number. They were not bound to a *pro rata* over the whole road, founded upon the number thus added to the branch. The mixing of the cars is immaterial, as it is not the identity of the cars added to the branch, but the number sent there, which is the important matter. If the others still got their former *pro rata* they could not interfere with the number added to the branch, a new work.

As to the alleged interpretation of the contract by the plaintiffs, it is sufficient to say that the question of fact was distinctly and fairly submitted to the jury on the whole evi-

dence, and the plaintiffs' right to a verdict made to turn on this fact. The jury found against it, and there was no motion for a new trial. The fact thus silenced by the verdict can not now be permitted to speak for this alleged interpretation by the acts of the plaintiffs.

The judgment is therefore affirmed.

WREN v. KIRTON.

(8 Vesey, 502. High Court of Chancery, 1802.)

Sale to agent confirmed. Purchase of a share in a colliery in trust for the agent and manager confirmed under particular circumstances, but with reluctance; the sale to the agent disapproved and only allowed to save further loss.

Colliery a trade. The rule that a purchaser shall have possession from the quarter-day preceding the sale, does not apply to a colliery, which is an article of trade, the profits accruing daily. The proper period is the month or week in which the purchase takes place.

A motion to confirm the master's report, that Wilson was the purchaser of a share in a colliery was opposed under the following circumstances, which were admitted:

Upon a former sale before the master the sum of 23,000*l.* was bid by a person, bidding *bona fide*. That sale was defeated by setting up a fictitious bidder. Afterward the lot was again put up three times. On the two first occasions no more was offered than 12,000*l.* and 6,000*l.* At the last sale Wilson was declared the purchaser at the sum of 15,000*l.* He purchased as trustee for Wade, the agent and manager of the colliery. The Lord Chancellor (ELDON).—This is a very difficult and important case. If this had been an original sale, and the agent had purchased in the name of another person, very slight circumstances would have induced me even at some risk to set that aside; as it was the duty of Wade, if he meant to bid, to furnish all the knowledge he had to those who were to sell. A regular proceeding in the master's office, which produced a bidding in the amount of 23,000*l.* by a responsible person, was met by a very improper transaction in setting up a man of straw to defeat that sale; which has

occasioned this loss. In general cases the court will at some risk put the property up again if the sale has not been properly conducted, which was the ground of the great case of Lord Gower in the house of Lords. The difficulty that presses me is the consequence, the danger of further loss by the resale. I would not hesitate to open the sale, if the least advance upon 15,000*l.* was offered; but without such an offer there is nothing leading me to suppose it will ever again reach the sum that was originally bid.

1803, Jan. 28th. The Lord Chancellor (ELDON), with considerable reluctance made an order, confirming the report; unless on or before the first seal an application should be made to open the biddings, giving security to answer the difference between the produce of the resale and the sum of 15,000*l.*

March 9th. No security having been offered, a motion was made, that the purchaser might be at liberty to pay in his purchase money, and be let into possession as from Christmas, 1801, the quarter-day previous to the purchase, paying interest from the 25th of March, 1802. Mr. ROMILLY and Mr. BELL, in support of the motion, urged the right of the purchaser to be put in the same situation, as if no delay had taken place; observing the danger to creditors from delays thrown in the way, especially in the case of leasehold property, of which twenty-five years only were unexpired at the time of the sale.

Mr. MANSFIELD and Mr. STEELE for the plaintiffs, creditors, and the person entitled to the surplus of the purchase money, subject to the debts.

The rule as to giving possession of a real estate does not apply to such property as this. These are not rents, but the profits of the trade. An account of the profits is taken among the partners every month or week; but the profits are made from day to day. There is no reason, therefore, in this instance, for going back to the beginning of the quarter; but the period ought to be the beginning of the month or week, as the profits are taken by the partners.

The Lord Chancellor (ELDON).—As this is a very important point, I shall consider of it. I do not recollect an instance

of an application to let a purchaser of a colliery into possession from the quarter-day; and if the rule is to be laid down for the first time, I should hesitate to apply the rule as to land, the occupier of which pays his rent half yearly or quarterly, and which is not subject to a sudden increase and decrease of profit, to a colliery, an article of trade, the profits of which accrue from week to week or day to day, and which in the preceding quarter may produce more than the succeeding ten years. A colliery is looked to for many purposes as a trade.

May 14th. The Lord Chancellor (ELDON).—This application is made upon the common rule, that a purchaser shall be let into possession from the quarter-day preceding his purchase, paying his money before the following one. The difficulty is, that there is no such thing as a quarter-day in this concern. They settle their profits monthly. He is therefore entitled to the profits only from the commencement of the month in which he purchased, paying his purchase money in the course of that month.

WILLIAMS v. ATTENBOROUGH.

(1 Turn. & Russ. 70. High Court of Chancery, 1823.)

Colliery, a trading concern. A colliery is to be considered as a species of trade; and the rule with reference to opening bids considered in reference to it as a continuing concern, and not as mere land.

Henry Attenborough, having devised his real and personal estate to trustees, upon trust to sell and to stand possessed of the moneys to arise from the sale upon trusts, for the benefit of his children, this suit was instituted for the purpose of having the property sold under the directions of the court.

By an order dated the 4th of December, 1821, the property was directed to be sold, and an agent for the parties interested was to be at liberty to make one bidding for each lot. The reserved bidding was to be made upon paper, to be delivered under cover to the person appointed to sell the estates, previous to the same being put up to sale; and in case no higher

price was bid than the sum mentioned in the paper, it was to be declared that the lot was bought in.

One of the lots, consisting of a colliery and other property, having been bought in under this order by a decree in the cause dated the 25th of June, 1822, a resale was directed, and the agent for the parties interested was empowered to bid as often as he should think proper, for each lot to be put up upon the resale.

On the 27th of July, 1822, the colliery was accordingly put up to sale in a separate lot. Upon that occasion an agent of the parties interested attended at the sale, and a person of the name of Bourne was declared the purchaser of the lot, at the sum of £8,850.

The confirmation of the purchase having been accidentally delayed, a motion was made to open the biddings on behalf of Syson, a person who turned out to be a fictitious bidder, being a day laborer in the service of one of the parties in the cause; that motion was refused; but a person of the name of Thorn having offered to give £10,000 for the lot, the Vice Chancellor directed the biddings to be opened upon his application.

It was now moved on the part of Mr. Bourne, that the order of the Vice Chancellor, by which the biddings were directed to be opened, might be discharged.

The affidavits in support of the motion rendered it doubtful whether Thorn was a *bona fide* bidder. From the time of the second sale the colliery had been worked by Bourne, at a considerable expense, under the superintendence of the devisees in trust of Attenborough; and it was represented by the persons beneficially interested, that the management had been very disadvantageous.

Mr. AGAR and Mr. HORNE, for Mr. Bourne.

Thorn is merely an agent for the parties interested in the estate. In favor of the parties interested the biddings can not be opened, their agent having been present at the sale. In the ordinary case of opening biddings, the property remains in the same state in which it was at the time of the sale; but Mr. Bourne having embarked his capital in the

management of this concern, is at least entitled to be indemnified for the expense he has incurred.

Mr. SHADWELL and Mr. PEMBERTON, for Mr. Thorn.

Mr. ROSE, for the devisees in trust of Henry Attenborough.

Mr. HEALD, for the defendants beneficially interested in the produce of the sale.

Mr. TRESLOVE, for the plaintiffs.—The parties interested in the sale have a right to open the biddings: *Hooper* v. *Goodwin*, Coop. Ch. Cases, 95. Whether they apply in their own name, or in the name of another person, can make no difference.

The LORD CHANCELLOR.—This being a motion to open the biddings, Mr. Bourne must be considered as the person at present entitled to the purchase.

Considering him, therefore, as the purchaser, the true question is, whether, having regard to the nature of the property, and the manner in which it has been treated in the master's office, together with all the circumstances of the case, the biddings ought to be opened; I say having regard to the nature of the property, because it has been solemnly determined in this court, that the sale of a colliery is not like the sale of a landed estate, and that a purchaser under the decree of this court, is not entitled to call for an account of the profits of a colliery from any particular quarter-day, as upon the sale of a landed estate he is entitled to do: *Wren* v. *Kirton*, 8 Ves. 502. Collieries and landed estates are quite different in the contemplation of this court; a colliery being always considered as a trade, the profits accruing from day to day as in all trading concerns. There are decisions of Lord Hardwicke's to that effect, where he held that a bill would lie for an account of the profits of a colliery, although for an account of the rents and profits of real estate no bill could be maintained.

With reference to opening the biddings, the nature of the property forms a very mtaerial consideration. Land, generally speaking, keeps pretty nearly to the same value,

although there may be, indeed, accidental changes in the value of land from temporary causes; but collieries are liable not only to fluctuations in value, but to destruction; they are like land in a country liable to earthquakes. The case of *Wren* v. *Kirton* is a remarkable illustration of the principle which ought to govern the resale of collieries.

On the first sale, in that case a colliery was sold for £23,000, the court opened the biddings, as it turned out, for a fictitious bidder; the consequence was, the property fell, first to £12,000 then to £6,000, and although it was ultimately sold for £15,000, there might have been a loss of the difference between £23,000 and £6,000, and there was an actual loss of the difference between £23,000 and £15,000. Such is the species of this property that it is almost impossible for the court to model the security to be given by the person applying to open the biddings in such a way as to avoid the possibility of loss. A deposit of £10 or £20 per cent. can not be sufficient, for in many cases it will evidently be better to forfeit the deposit than to take the property; better to forfeit £1,000 than to take a property which may sink in the proportion stated from the case of *Wren* v. *Kirton*. Again, upon a resale of the property, the purchaser may be tired of his bargain before he has completed his purchase, and although it is true that the court may compel the final bidder to pay the money, the process is such that in a great many cases it is more for the interest of the vendors to abandon the bargain than to put in force the process of the court.

From these considerations it has always appeared to me, that where the subject of a sale is a colliery, a trade of so very hazardous a nature, in which there is always such a vast deal of speculation, and such a great number of speculators, you can not apply the same rules which are applied to purchasers of landed estates.

The property is liable to such variations in value in very short intervals; the blasting of a mine or any other accident —even a change in the markets, or, to take an instance at the present moment, the stoppage of a navigation by frost, may make such a difference in the course of a week, that in all these cases it is the duty of the court to consider, as the Vice Chancellor appears to have done very fully and prop-

erly in Syson's case, not what the particular interest of the suitors in any particular cause would require for their advantage, but what the general principle ought to be, with reference to the general benefit of the general suitors of the court.

When Thorn's case came on before the Vice Chancellor, he seems to have lost sight of the principle which he had laid down in Syson's case, and to have thought that Thorn, if he was a *bona fide* bidder, had some sort of right to open the biddings. Now no one can be said to have any right to open the biddings, since it is always in the discretion of the court to grant the application or refuse it.

The question is, not whether the person applying is a *bona fide* bidder, but whether, regard being had to the nature of the property, the circumstances of the case, and the general interest of the suitors of this court, not the interest of purchasers in the master's office, so much advantage is held out as to induce the court to open the biddings.

During a period of nearly half a century which I have passed in this court, and in which Lord Apsley, Lord Thurlow, the Lords Commissioners with Lord Loughborough at their head, then Lord Loughborough as Chancellor, and after him the Lords Commissioners with Lord C. B. Eyre at their head, have presided here, I have heard one and all of them lament that the practice of opening biddings was ever introduced.

I confess that I have great doubts myself upon the subject; but after a practice so long established it is not for me to disturb it. This method, however, of authorizing parties to bid at the sale, is quite modern, and requires a great deal of consideration, as there can be little doubt that it has the effect of damping the sale; so highly did Lord Kenyon disapprove of parties interested in the sale bidding by themselves or their agents, that if there was a suspicion that any agent on the part of the vendor had been bidding in the master's office, he would not enforce the execution of the contract.

There is another view of this case taken by Mr. Agar which is entitled to a great deal of weight—how far these parties may be considered by their agents to have been present at the sale. The court, indeed, has not adopted it as a universal rule that the biddings shall not be opened in favor of parties who are present at the sale; but that circumstance undoubtedly fur-

nishes a very strong objection to the interference of the court. The case of *Goodwin* v. *Hooper*, in which a residuary legatee was allowed to open the biddings, has been cited in argument.

There can be no doubt at this time of day that a residuary legatee may become the purchaser of an estate sold in the master's office; so may a tenant for life, or the owner of a reversionary interest; but if the matter were *res integra* I should have great doubts whether they ought to be allowed to do so; they thereby frequently contrive to buy the fee simple at a rate at which no one else could get it; from their knowledge of the property they stand nearly in the same situation as trustees, who are excluded on this ground from bidding for trust property.

In this case, upon the second sale, Mr. Bourne became the purchaser, and as the purchase could not be confirmed for a considerable time, it became absolutely necessary to take into consideration who should have the intermediate management. It was finally agreed that Mr. Bourne should work the colliery under the superintendence of the trustees; it would have been folly in the purchaser if he had not insisted on having, in some measure, the management, for if, between the day of bidding and the confirmation of the purchase, the value of the mine had fallen, from some accidental cause injurious to the working, from some rival coal mine, or a destructive inundation, still if the title had been completed at the time his report was confirmed, he would have been compelled to take the property. Without entering into the question in this case, whether the management has been advantageous or disadvantageous, let us suppose that the management has been advantageous; nobody can deny that to discharge a purchaser under such circumstances upon giving him his costs merely, without making some allowance for the expense incurred in the management, would be treatnig him in a way very detrimental to the general interest of all those who have collieries to dispose of through the intervention of this court. If the case turned upon Thorn's being a *bona fide* bidder, there must have been further inquiry; but I have said quite enough to show, that regard being had to the nature of the property, these biddings ought not to be opened. You can not lay down

rules which would be generally mischievous, in order to give a benefit to particular individuals. It is probable that if Thorn is a *bona fide* bidder, he may not be intended by these parties to become the final bidder. At all events it may turn out that somebody else will bid more; then how is the security to be managed? The deposit of the whole money will not secure us from the possibility of a loss, because if there is one person who bids more, Thorn will be discharged, and his deposit can never be made a security for such subsequent bidder. In the case of *Wren* v. *Kirton*, the court was disposed to open the biddings, if security was given to answer the difference between the produce of the re-sale and the £15,000; but it is extremely difficult to manage the security unless the whole money is paid into court, to remain in court as a pledge that the next purchaser shall perform his contract.

The order of the Vice Chancellor, directing the biddings to be opened, was discharged.

1. The term colliery is such a term as may be explained by calling expert testimony to show its meaning. It doubtless includes many things in the nature of fixtures but it can not be extended to include loose movables: *Carey* v. *Bright*, 58 Pa. St. 70.

2. Plaintiff, seeking to enforce agreement for carrying on a colliery, must take it subject to all agreements, as a continuing concern: *Burroughs* v. *Elton*, 11 Ves. 29.

3. Valuation of a colliery fixed by the annual profits: *Wightwick* v. *Lord*, 6 H. L. Ca. 217.

4. A colliery is a trading concern: *Burroughs* v. *Elton*, 11 Ves. 29; *Story* v. *Lord Windsor*, 2 Atk. 630; *Dudley* v. *Warde*, Ambler, 113; *Post* FIXTURE.

5. Lessee of colliery which had become unworkable, relieved on equitable terms: *Smith* v. *Morris*, 2 Br. Ch. Ca. 311; *Post* LEASE.

6. The engines at a colliery treated as personalty, going to the executor: *Dudley* v. *Warde*, Ambler, 113; *Post* FIXTURE.

7. Lessee must provide the "breaker" and deliver coal in marketable condition: *Audenried* v. *Woodward*, 28 N. J. L. 265; *Post* RENTS AND ROYALTIES.

8. Rental of colliery; work so controlled as to fraudulently affect quarterly payments: *Green* v. *Sparrow*, 3 Swanst. 408; *Post* RENTS AND ROYALTIES.

9. Equitable control as to royalties and workings: *Wheatley* v. *Westminster Co.*, L. R. 9 Eq. 538; *Post* LEASE; *Watson Co.* v. *Casteel*, 73 Ind. 296; *Post* LEASE.

10. Colliery not partable: *Wild* v. *Milne*, 26 Beav. 504; *Post* PARTITION.

11. Colliery kept going under receiver pending disputed ownership: *Gibbs* v. *David*, L. R. 20 Eq. 373; *Post* RECEIVER

12. Privilege to use colliery does not imply right to use it to reach foreign coal: *McCloskey* v. *Miller*, 72 Pa. St. 151.

FAY v. STEAMER NEW WORLD.

(1 California, 348. Supreme Court, 1850.)

Bailee without hire. A common carrier is not liable for goods carried without hire where he has exercised ordinary diligence in the care of them.

Facts of the case—Gold dust. Where a merchant was in the habit of having gold dust carried gratuitously from Sacramento to San Francisco, the owners of the boat uniformly refusing to carry it for hire or to become liable as common carriers, a quantity of gold dust was stolen without any neglect or fault on the part of the officers of the steamer, *held*, that the defendant was not liable therefor.

Liability for refusal to carry. Whether a common carrier of *goods and passengers merely*, can be made liable in an action for refusing to carry *gold dust*. Query?

Appeal from the Superior Court of the City of San Francisco. This was a proceeding under the act to provide for the collection of demands against boats and vessels, passed April 10, 1850. The Superior Court gave judgment in favor of the plaintiffs, from which judgment this appeal was taken. The material facts are given in the opinion of the court.

GEORGE F. NOYES, for plaintiffs.

A. T. WILSON, for defendant.

By the Court, LYONS, J.

The question presented in this case is, are the owners of the steamer *New World* liable, as common carriers, for $3,000 worth of gold dust, lost under the following circumstances: Plaintiffs, on the 28th day of September, a short time before the departure of the steamer from Sacramento City, delivered to the clerk thereof a package of gold dust, containing $3,000, the property of plaintiffs, and $500 belonging to other parties, to be taken to San Francisco. The steamer is used for the transportation of passengers and freight between the two cities named. It appears that the officers have always refused to receive coin, gold dust, or bullion as freight; and that, to all persons indiscriminately, as well as to these plaintiffs, the clerk has given actual notice that he would receive gold dust

or money only on condition that no charge should be made and no responsibility incurred. Plaintiffs made their shipment as above, after having this notice. The vessel arrived at San Francisco at about eleven o'clock P. M. The clerk seems to have exercised due diligence and precaution, for he locked his office and instructed the watchman to guard it. The safe was full; and the package of plaintiffs, as well as the funds of the boat, was in the office, not in the safe. The same night the office was broken open, and all the money not so secured was stolen. It appears that plaintiffs had been in the habit of shipping their funds through certain express offices, but had discontinued that practice from motives of economy; the *New World*, as before stated, consenting to carry valuables without charge, if the owner incurred all risk of loss. They seem to have assented to these conditions, and arranged with the clerk of the *New World* to forward by him their money packages.

Plaintiffs were used to transport their freight on this steamer from San Francisco to Sacramento; and it is contended that this is sufficient consideration for the conveyance of the valuables not specially charged for. If this had been stipulated between the parties, or if the agents of the steamer had made a distinction between those who shipped, paying freight, and those who did not, carrying the gold dust of those only of the first named class, the defendants might perhaps be liable; but the evidence shows that the clerk made no such distinction, but refused to receive gold dust from all persons indiscriminately, except upon the conditions before named, receiving no compensation, and declining all risk. Common carriers, it is true, can not abridge their liability by notice through newspapers, or otherwise, but this case does not come within that rule. Here, there was a special contract with the clerk of the steamer, well defined and understood, that he would receive the treasure, charge nothing for its conveyance, and incur no liability in case of loss. If the conditions imposed did not suit plaintiffs, they might have declined them. But it has been urged that being a common carrier, the boat, *as such*, was obliged by law to receive the treasure, with the responsibility that attaches to common carriers, with or without compensation. If such, in-

deed, were the law, and the duty of receiving freight of every character be imposed on the carrier, then, in case of refusal to comply with this obligation, an action for damages might lie. In the case at bar, the imposition of conditions was equivalent to a refusal; but whether it is the duty of a freight and passenger steamer to receive and transport property of every character which may be offered, is a question which need not be determined in this case. The defendants are sued as common carriers, and hence, their liability as bailees without hire is not to be examined.

Judgment reversed.

RICE v. BOSTON & WORCESTER RAILROAD CORPORATION.

(98 Massachusetts, 212. Supreme Court, 1867.)

Negligent unloading of coal. A railroad corporation does not discharge itself of its duty as a carrier by merely bringing goods to the terminus of its road; it is bound also to unload them with due care, and put them in a place where they will be reasonably safe and free from injury. In this case the railroad was held liable in damages for so carelessly discharging assorted coal as to mingle the different sizes, and also to mingle with soil, so as to render the coal unsalable.

Tort, alleging that the defendants as common carriers transported a quantity of assorted coal from Boston to Needham to be there delivered to the plaintiff as consignee and owner thereof, and, at Needham, without giving him due notice or waiting a reasonable time for him to receive the coal and remove it, "negligently unloaded said coal immediately upon the arrival of the same, greatly injuring said coal and mixing the same with soil and different kinds, thereby rendering the same unsalable, and making the plaintiff undue and great expense in removing the same."

Trial in the Superior Court before MORTON, J., without a jury, when it appeared that the defendants were transporting from Boston to Needham two cargoes belonging to plaintiff, comprising three hundred and fifty tons of different sorts and

sizes of coal, and on August 12, 1866, dispatched from Boston some car-loads of this freight; that on their arrival at Needham, notice was given to the plaintiff, who at once set a gang of men to work removing them to his coal-shed; that on August 15th, while the plaintiff's gang was thus engaged, the defendants dispatched from Boston the remainder of the coal, accompanied by laborers who, immediately on the arrival of the train at Needham, unloaded the cars by the side of the track, without preparing the ground to receive the coal by laying down boards or otherwise, and thereby the different sorts and sizes of coal were mixed and soil was mingled with it; that no notice was given to the plaintiff of the arrival of this part of the coal; and that there was no depot at Needham where it could have been placed under cover.

The defendants asked the judge to rule: 1. That they were not liable as common carriers, after the arrival of the cars at Needham; 2. Nor under obligation to give the plaintiff notice of the arrival of the coal before unloading; 3. Nor liable, on the plaintiff's declaration, for any injury arising from the character of the place where they deposited the coal.

But the judge declined to make these rulings, and ruled "that the defendants were liable for the want of reasonable and ordinary care in unloading the coal after its arri val, and that if no notice was given to the plaintiff of the arrival of the coal, they must unload it in a proper place, and with reasonable and ordinary care"; and the judge found "that it was not reasonable care to unload it upon the ground, where this coal was unloaded, and where it was mixed with the mud and soil, and where the different kinds and sizes were mixed together." The defendants alleged exceptions.

G. S. HALE, for the defendants.

I. D. VAN DUZEE, for the plaintiff.

BIGELOW, C. J.

The rulings were clearly right; the only objection now urged to them is, that it should have been held that the defendants were not liable as common carriers after the arrival of the cars at the place where the coal was to be delivered.

But the position is untenable; the contract of a common carrier includes not only the transportation of merchandise to a particular point, but also its delivery there to the consignee, or the putting it into a suitable place where it can be received by him. A railroad corporation does not discharge itself of its duty as a carrier by merely bringing goods to the terminus of its road; it is bound also to unload them with due care, and put them in a place where they will be reasonably safe, and free from injury; until this is done, the duty and responsibility which attach to a corporation as carriers, do not close: *Thomas* v. *Boston & Providence Railroad Co.*, 10 Met. 472, 477; *Norway Plains Co.* v. *Boston & Maine Railroad*, 1 Gray, 263, 272.

In the latter case, on which the defendant's counsel seems to rely, it is expressly stated that the goods must not only be safely carried, but also be discharged on the platform of a depot, or put into a place of safety.

It was a clear breach of the duty of the defendants in this case, to unload the coal in an unsuitable place, where it could not be taken away without being mingled with foreign substances, or to unload it in such manner that different sizes and kinds were mixed together so as to render it unsalable. The allegations in the declaration sufficiently set out this breach, and the plaintiff is entitled to recover under them the damages assessed by the court.

Exceptions overruled.

The Oil Creek & Allegheny River Railroad Co. v. The Pennsylvania Transportation Co.

(83 Pa. St. 160. Supreme Court, 1876.)

Ultra vires—Modification of contract question for jury. A railroad company agreed to pay to a pipe line company, a certain sum for each barrel of oil transported by the former in consideration that the latter would deliver all of its oil to the railroad company for transportation. The agreement was subsequently modified in such a way that it proved to be less favorable to the railroad company, and after one payment it refused to settle upon the new basis. The oil pipe line company ac-

cepted payment under protest on the basis first agreed upon and brought suit for the balance due upon the contract. Defense, that the contract was *ultra vires*. *Held*, that to the extent the contract was executed, the plea of *ultra vires* would not be allowed, but it may be ground for rescinding the contract as to future transactions. *Held, also*, that in this case, there was sufficient evidence to justify the court in submitting to the jury the question of the subsequent modification of the contract.

Error to the Court of Common Pleas of Crawford County.

This was an action of debt brought by the Pennsylvania Transportation Company against the Oil Creek & Allegheny River Railroad Co., to recover the amount alleged to be due on a contract between the parties. The plaintiff was the owner of the pipe lines in the oil regions of Pennsylvania, connecting the oil regions with several points on the defendants' railroad.

On July 26, 1871, the railroad company of the first part, and the transportation company of the second part, entered into an agreement which, after reciting that the parties desired to co-operate with each other in transporting oil, and to harmonize their respective interests, provided as follows:

"1. That the party of the second part covenants, etc., to run all the oil, in any manner under its control, through its pipes, etc., to the railroad of the party of the first part, to be delivered at the tanks and depots situated upon or near said railroad for transportation by said party of the first part, it being understood and agreed that said party of the second part will co-operate with the party of the first part in said transportation of oil, and will use all the means within its power to deliver all the oil it can control to said party of the first part for transportation over its railroad.

"2. That the party of the first part agrees to pay to said party of the second part on all oil, or its products, carried and transported over the railroad of the party of the first part, to Union, Corry, Irvington and Oil City, ten cents per barrel when the rates of freight on oil charged and received by the said party of the first part for transportation are forty-five cents per barrel or more, and five cents per barrel when the rates of freight on oil charged and received by said party of the first part are twenty cents per barrel. It is expressly un-

derstood that the said payments are not to be made on oil carried through pipes now owned by the Empire Transportation Co., or oil moved in yards, or for a distance not exceeding four miles, when the rates do not exceed fifteen cents per barrel. It is further understood and agreed that in case said party of the first part shall reduce its rates below said forty-five cents per barrel that the said sum of ten cents per barrel to be paid to said party of the second part, as before provided, shall be reduced proportionately to such reduction on the rates charged on said railroad.

"3. That the party of the second part covenants, etc., that it will not construct, lay, use, lease or operate any line or lines of pipe which may be parallel with the railroad of the party of the first part, or which may connect with any other railroad or railroads, pipe or pipes, or which may compete with the said party of the first part in the business of transporting oil by river, or rail, or otherwise."

It was further agreed therein that the contract should continue in force twenty-five years, and that statements should be rendered and payments made under it about the middle of each month for the preceding month.

It appeared from the evidence that when freights fell *below* twenty cents it was understood that the transportation company was not to receive any payment upon the oil transported by the railroad company.

Both parties worked under this contract and monthly statements were made regularly under it till September, 1872. Before that time freights were falling below twenty cents, so that the transportation company was not entitled to receive any payment under the contract for oil transported. On August 9th of that year the board of directors of the railroad company appointed a committee with power to arrange with the transportation company "for a modification of the contract by which a uniform rate of five cents per barrel on all oil carried shall be adopted in lieu of all existing arrangements."

The communication of this resolution of the board of directors of the railroad company was made to the transportation company at a directors' meeting held on September 9, 1872, by two of the directors of the railroad company, either

by a copy of the resolution or by the original; the evidence did not clearly show which. At this meeting of the transportation company's board a resolution was passed "that this company consents to the modification suggested by the Oil Creek & Allegheny River Railroad Company of the contract between said company for pipeage on oil, and that Henry Harley, W. H. Kemble and G. K. Anderson are hereby appointed a committee on part of this company to carry the modification or change of contract into effect, viz.: instead of the present rate of pipeage, the said Oil Creek & Allegheny River Railroad Company to pay to this company five (5) cents per barrel on each and every barrel of petroleum oil or its products which may be transported on said railroad."

There was no evidence that the committees appointed by the respective boards ever met together to make a formal settlement of the modification, or that it was ever formally reduced to writing and signed by the representatives of the companies.

W. S. Lane, one of the plaintiffs' witnesses, testified as follows:

"I knew the matter of modification was being discussed. I was one of the counsel at that time and previous, for company defendant. Mr. Gay told me a meeting of pipe company was to be held, to take action on resolutions of railway company of August 9th. Gay gave me railway company's duplicate of contract of '71 and instructed me, when pipe company had taken action in modification, to indorse it on contract. Was in pipe board also, elected for railway interests. Had personal knowledge that the resolution was accepted by both companies. Attended meeting of board of directors of pipe company in Philadelphia, when modification was presented and adopted. On same day of meeting made indorsement on contract of the resolution, according to instructions of Gay, which contract, as indorsed, I have never seen from that day to this."

The witness was shown a copy of the indorsement on the contract, and said, "The copy is substantially correct."

Cross-examination: "I knew of the action of modification by railway company. Gay gave me instructions to indorse resolution of modification on original contract. I gave contract with indorsement to Gay, because I received it of him;

because he was at the office of railway company, which was a proper place to deposit it."

Direct examination: "Gay officiated for some time after I gave him the contract."

The indorsement was as follows:

"By agreement of the parties to the foregoing contract, and by authority of the board of directors of the O. C. & A. R. Railroad Co., and by authority of the board of directors of the Pennsylvania Transportation Company, the foregoing contract is changed and modified in regard to the rates of pipeage, as follows, viz.: That in lieu of the rates of pipeage within mentioned, the O. C. & A. R. Railroad Co. shall pay to the Pennsylvania Transportation Co. five cents per barrel on each and every barrel of petroleum, or its products, which may be transported on the said railroad of the O. C. & A. R. Railroad Co. This to take effect on and after the 1st day of Aug., 1872, and continue for and during the balance of the foregoing contract."

There was evidence that the modification of the contract had been virtually agreed upon between the presidents of the two companies before these meetings of the respective boards were held.

The statement of oil transported in August, 1872, made out on the new basis, was paid on September 17, 1872, by the railroad company. In subsequent months, the latter company refused to settle on the new basis, and the transportation company accepted payment according to the terms of the original contract, under protest.

Monthly payments were thus made under the terms of the original contract until February, 1874, when the defendant became pecuniarily unable to pay. In July, 1874, it went into the hands of a receiver, in which condition it was when this suit was brought. This action was brought to recover an additional amount alleged to be due under the terms of the modified contract.

At the trial before Lowrie, P. J., the defendant offered to show that at a meeting of its board, held August 31, 1872, Edward F. Gay resigned his position as president and director of the defendant company, and Mr. Bodine resigned his position as director; also that at a meeting of the defendant's

board, held November 15, 1872, at which C. B. Wright, a director of the transportation company, was present, a resolution was passed rescinding the resolution of the board of August 9, 1872, authorizing a modification of the contract with the transportation company. These offers were refused and a bill sealed for the defendant. The defendant offered evidence tending to show that the directors of the defendant company (who were at the time of the alleged modification also directors and stockholders of the plaintiff company), had acted at variance with their duties as directors of the defendant company, and in their individual interest as stockholders and directors of the plaintiff company. This offer was also refused and a bill sealed for the defendant. The defendant submitted a number of points, among them these:

1. That the measure of the power of the plaintiff and defendant companies is to be found in their respective charters, and that there being no legislative authority granting to either the plaintiff or defendant company power to enter into the alleged contract sued on, such contract, even if made was *ultra vires*, and the plaintiff can not recover in this action.

The court reserved this point, and after argument delivered the following opinion upon it.

"The contract here referred to is the one composed of the written agreement of 26th July, 1871, the resolution of defendant's directors of 9th August, 1871, proposing a change in that agreement and the resolution of the plaintiff's directors of 9th September, 1871, accepting that proposal, not the agreement of 26th July merely, for they did make that, and acted under it and the defendant still claims to do so. They *did* make it, and there would be a contradiction in now saying they *could not* make it, unless in the two assertions we use the word *make* in a different sense. Not that, but the change made by the resolution is complained of, and here again it is a contradiction to say they *could not*, for the fact remains they *did it*, and for some time they acted on it. There was, in fact, a change, which was effectual at least to annul the original agreement, and the defendant would now repudiate the new in order to fall back on the old. And the relation intended by the contract was, as a fact, continued until this suit was brought, and now the only dispute is, on what terms, *the new* or *the old*.

"The other portion of this point, whether the making of such a contract was a lawful exercise of corporate functions by the parties, is therefore quite irrelevant. We are now to deal with the actual facts, not with the functions. Men may not lawfully make certain contracts on Sunday. But suppose them made and partly performed, then the function of the law changes. The State does not, in fact, avoid this agreement, and the defendant did not annul it as an unauthorized act of their directors, but took all the benefits it offered then; and now we must judge of the duties of each to each by their acts much more than by their functions. This point is, therefore, decided in favor of the plaintiff."

6. That a proposed contract is not binding on the party proposing it until acceptance of the other party has been communicated to the party proposing or his agent; and if the jury believe from all the evidence that the acceptance by plaintiff's company of defendant's proposition embodied in resolution of August 9, 1872, was never communicated to the board of directors of defendant company or to any member thereof who had been constituted its organs of communication on this subject, then there was no contract consummated, such as is sued on, and their verdict must be for defendant.

Answer. "We affirm this point. But we do not see that any form of communication of the acceptance was agreed on, and the jury must judge whether it was in any way made known, as an acceptance to the defendant; and if they acted upon and according to it, this is evidence of the fact of notice."

10. That under the pleadings in this case, if the jury should find from the evidence that the alleged modified contract was never consummated, then the plaintiff can not recover at all in this action.

Answer. "We affirm this point."

The other important points raised either the same question as the first point or the incapacity of the same persons to act as directors of both companies in making a contract between them.

The verdict was for the plaintiff in the sum of $197,285. The court, being of opinion with the plaintiff on the reserved points, entered judgment on the verdict. The defendant then took this writ of error; the numerous assignments

raised these two questions: 1. Whether the contract upon which this action was brought was *ultra vires*. 2. Whether such contract was found by the jury upon sufficient evidence.

Mr. CROSBY and HAMPTON & DALSELL, for the plaintiff in error.

J. DOUGLASS and PEARSON CHURCH, for the defendant in error.

Mr. Justice PAXSON delivered the opinion of the court, January 2, 1877.

There are twenty specifications of error in this case. They raise, however, but two substantial questions, viz.: 1. Was the contract upon which the plaintiffs were allowed to recover, *ultra vires?* 2. Was such contract found by the jury upon sufficient evidence? Neither proposition presents a question of serious difficulty. It does not appear to have occurred to the defendants below that the contract of July 26, 1871, was *ultra vires* until it became apparent that by their subsequent modification of it they had made a bad bargain. They then attempted to repudiate the modification and fall back upon the original agreement of July 26th. Yet the illegality, if any existed, was to be found in the original contract; assuming that to be legal, the modification of it was equally so. We do not think the defendants are in a position to defend upon the ground of the illegality of the contract. There were mutual covenants and mutual advantages. The defendants had enjoyed the advantages, such as they were. To the extent of the demand in this suit the contract was executed, and to say now that it is *ultra vires* comes with an exceedingly bad grace from the defendants. It may be that having shown performance on their part they would have a right to rescind the contract as to future transactions upon the ground of its illegality. Upon that point we express no opinion. But there is no rule of law which permits them to retain both the benefits and the price. So far as the contract of these parties may be said to be against public policy and transgressive of their respective charters there is ample remedy. There is a mode by which the commonwealth may call a corpora-

tion to account where it violates its charter or the rights of the people. The rights of the commonwealth are in no manner involved in this suit.

In regard to the second proposition we think there was sufficient evidence to justify the court in submitting to the jury the question of the subsequent modification of the contract of July 26th. Nor can we say that their finding was not warranted by the evidence. While some of the specifications of error in regard to the admission of evidence are not entirely free from doubt, we perceive no sufficient error to justify us in reversing upon this ground, especially in view of the fact that the defendants acted upon the modification, and settled for one month upon that basis.

Judgment affirmed.

1. Relation of railroad to a coal company necessarily dependent on its line; recovery of excessive freight extorted: *Chicago Co.* v. *Chicago Co.*, 79 Ill. 121; *Post* CONTRACT.

2. A mining company having a railroad of its own, is not a common carrier: *Peoria Co.* v. *Coal Valley Co.*, 68 Ill. 489.

3. An express company carrying nitro-glycerine without knowledge of the contents of the box inclosing it, is not liable for the consequences: *Parrot* v. *Wells, Fargo & Co.*, 15 Wall. 524.

4. Transportation of oil by pipe line: *United Co.* v. *Standard Co.*, 33 N. J. Eq. 123; *Post* INJUNCTION; *Central Co.* v. *Standard Co.*, Id. 127; *Post* INJUNCTION.

5. Congressional regulation of the carriage of petroleum on passenger vessels: *U. S.* v. *Thornburg*, 6 Fed. R. 41.

6. Responsibility of stage company for gold dust: *Hellman* v. *Holladay*, 1 Wool, 365; *Post* GOLD DUST.

7. Excessive freights, paid without mistake of fact, fraud, extortion or duress, not refundable: *Potomac Co.* v. *Cumberland Co.*, 38 Md. 226.

8. On general contract to transport, the shipper elects the quantity: *White* v. *Toncray*, 9 Leigh, 347; *Post* CONTRACT.

9. Cases of coal shipments: Notes *ante*, p. 387-8.

LUPTON v. WHITE
AND
WHITE v. LUPTON.

(15 Vesey Ch. Rep. 432. The High Court of Chancery, 1808.)

Confusion of ores—Costs. Agent or bailiff, confounding his principal's property with his own, charged with the whole, except what he can prove to be his own, and in this instance, the case of a breach of the terms upon which the court dissolved an injunction, the inquiry was directed with costs.

Directions to master. The court refused, in such a case, a prospective direction to admit books not legal evidence, usual in a fair case; as where from want of notice of an adverse claim, a strict account can not be given; merely giving liberty to apply upon any question of evidence.

The bill, upon which the first of these causes was instituted, prayed an account of lead ore, obtained under premises called the Little Ing, in the Manor of Beverley, in Yorkshire, claimed by the plaintiff as his estate, and an injunction against continuing to work the mine. The defendants were the owners of considerable lead mines adjoining, and lessees under him, contending, that the Little Ing, which did not contain more than four or five acres, was comprehended in the leases. An injunction having been obtained was dissolved, upon the undertaking of the defendants, that, being permitted to continue to work the mines, which had been worked together, as one mine, distinct accounts should be kept of the ore produced from under the Little Ing. An issue was directed; and the verdict having established the plaintiff's title to those premises, an account was directed of the lead ore, etc., got by the defendants in the first cause, under the close called the Little Ing. The master's report stated, from the affidavit of the defendant White, that the other defendants were lessees under him, or otherwise concerned as partners, in the Prosperous mine, also situated in Beverley, rendering a certain duty in lead to him, as rent; that they were at the entire risk and whole expense of working that mine; and consequently, the books of account, etc., were in their custody.

The report further stated, from the affidavit of Findlay, one of the defendants in the first cause, that two books of account

produced were the only books kept for entering the general accounts of the lead mines, including the Little Ing; and that all the ore which, during the years 1802, 1803 and 1804, was got in Prosperous mines and under Little Ing, was brought up through the shafts and levels of, and smelted and sold as belonging to, the Prosperous mine. Two of the lessees stated, that, before they entered upon any working within the limits of the Little Ing, they were apprehensive, from the threats of Lupton, that some dispute might probably arise as to their right of getting minerals there; but, as the minerals within the Little Ing were comprised in their lease, they carried their workings into it, and continued them, until the first injunction was obtained; in consequence of which they desisted until that injunction was dissolved; and, upon renewing their workings, they had the caution to direct their agent to lay into separate heaps, and to keep a distinct account of, all the minerals that should be raised from the Little Ing and to inform the smelters which was the particular ore which came from that ground, that they might distinguish it.

The master stated his opinion upon all the books produced, that the defendants have not rendered a true account of the lead got from the Little Ing; and that the account of sales of lead, in the book entitled "The accounts of Little Ing," and several other books produced, have been so kept or contrived as to prevent a true discovery, as well of the ore got by the defendants, Wood & Co., from under Little Ing, as of the lead produced therefrom, and that for the purpose of preventing a discovery of the ore got from under Little Ing, and of the lead produced therefrom, the defendants, Wood & Co., caused the ore got from the Little Ing to be mixed with the ore got out of their adjoining mine; and the ore from both mines was smelted together at the same hearth, and marked with the same mark and letter; that, in payment of the duty lead to the defendant White, no distinction was made between the lead arising from the ore got from one mine, and the other; and in order to prevent a proper examination of the workings under Little Ing, the defendants permitted some of the workings to fall in, willfully filled up other parts with rubbish, and drowned the lower part, so that no true estimate could be formed of the quantity of ore got by the defendants, Wood & Co., from

or under Little Ing; and under all the circumstances, and upon all the evidence, the master stated that he found it impossible to take an account, with any degree of accuracy, of the ore, etc., got under the Little Ing.

Exceptions were taken to the report on the ground that the master had not charged the defendants with the sum of £23,986 9s. 6d. received by them as the value or produce of lead, which, under the circumstances proved before the master, ought to have been made from the ore got by them from under the Little Ing.

SIR SAMUEL ROMILLY and Mr. BELL, in support of the exceptions: The point maintained by these exceptions is, that the defendants ought to have been charged with the whole produce of these mines, leaving them to discharge themselves by showing what was the produce of their own mine, upon the principle that every presumption is to be made against an agent who, by his tortious act, has made it impossible for the plaintiff to distinguish his property, a principle that has been frequently acted upon.

In the case of *Panton* v. *Panton* (in the court of exchequer) the defendant remitted considerable sums, the property of the plaintiff, with money of his own, to an agent in London to be laid out; and the securities were changed for the purpose of misleading and making it impossible for the plaintiff to distinguish his property, part being clearly the property of the defendant. The court held that it was upon him to distinguish what was his own, and an issue was directed, with the affirmative upon him; but a compromise taking place it was not tried. Upon the same principle in *Armory* v. *Delamirie*, 1 Str. 505, the case of a diamond ring found by a poor boy, and a jeweler taking out the stone and giving him a trifle, the jury were directed to give the amount of the most valuable diamond. Your Lordship, in the case of *Mr. Jackson's executors* (*White* v. *Lady Lincoln*, *Kinderly* v. *The Duke of Newcastle*, 8 Vesey, 363) acted upon a similar principle.

This case has further the peculiar circumstance, that these defendants, in consideration that the injunction should be dissolved, and they should be permitted to proceed with their works, undertook to the court that the accounts should be perfectly clear and distinct. The effect of that undertaking is, that they were bound by contract to the court to consider

themselves as bailiffs; yet they have not only not kept distinct accounts of the ore produced, but by suppressing and fabricating evidence, and other management, have deprived the court of all means of having distinct accounts.

SIR ARTHUR PIGGOTT, Mr. RICHARDS, Mr. WEAR and Mr. WHITE, for the defendants, contended that the proposition is extravagant, that as the ore produced from the plaintiff's mine has been mixed with the produce of the other, the plaintiff should have the whole.

The Lord Chancellor (ELDON).

The master's report, stating that he can not take the account which has been directed, is the subject of further directions, rather than of exception. The account was directed upon a familiar principle of equity; though the object might have been obtained in an action for mesne profits, or trover.

An inquiry before a jury having ascertained satisfactorily that the plaintiff is entitled to what was under these premises, the court was bound to enjoin the defendants from proceeding, or permitting them, with reference to the convenience of both mines, to proceed; that could be allowed only upon their undertaking to keep an account, and then they can not be heard to say they could not keep it. If the account does not satisfy the object and intention of that undertaking it is not a compliance with the condition in that rational sense in which it must be understood. If the result is that the master can not take the account, it is clearly not for him, without a further direction, to apply the great principle, familiar both at law and in equity, that if a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must, both at law and in equity, be taken to be the property of the other, until the former puts the subject under such circumstances that it may be distinguished as satisfactorily as it might have been before that unauthorized mixture upon his part. There may be cases in which the master may charge parties upon that principle, but it must be under the direction of the court, who will judge whether the case is proper. I agree entirely with the master, that under these circumstances he can not take such an account as this decree

calls for. The consequence is, that upon further directions it must either be referred back to the master, with a direction to guide him as to the mode of charging the defendants, where he can not take the account satisfactorily, or an issue must be directed, taking care not to overlook the principle I have mentioned, which throws the proof upon the defendants.

Therefore I shall not allow these exceptions; but without prejudice to what the court may think proper to do upon further directions.

Dec. 19th. The cause being heard for further directions, the same question was again argued, the defendants pressing for a special direction to the master to receive the books in evidence.

The LORD CHANCELLOR.—This case comes before me under circumstances in some respects different from any which this court has hitherto had to deal with in cases of a similar nature. The defendant White, as far as he is concerned, is involved in it simply in consequence of his own undertaking. No misconduct, no fraud are imputed to him. He is culpable, not morally, but only for having applied too little attention to his own interest. With regard to the other defendants, this is a case of great and serious importance, especially with reference to the example which the court is to furnish; and, in my view of transactions of this nature, a court of equity ought to go to the extent of all that is just (and beyond that no court ought to go), to restrain persons from dealing with the property of others, as these defendants have dealt with the property of this plaintiff.

An injunction having been obtained, the court refused to relieve the defendants against it, unless they would lay themselves under an obligation, which would prevent those difficulties that had obstructed the administration of justice between these parties. With that view, upon an application to dissolve the injunction, the court refused to interfere, except upon terms; accordingly the defendant White, who seems to have placed more confidence in his lessees and agents than they deserved, and the other defendants, agreed to the terms proposed; that, as it would be inconvenient to their concerns, entangled as they had been with the working of the mines claimed by the plaintiff as his inheritance, to discontinue working as they had done, if the court would permit them to

work under the Little Ing, they would account fully for all they should take from it, if it should appear that the soil and the mines under it were the inheritance of the plaintiff. They stand before the court upon the faith of that undertaking, which they were bound to make good, as if a receiver had been appointed; or the injunction continued, and these parties are to be considered, not as man acting toward man, but with reference to an undertaking by one man to leave the other as safe as if the protecting hand of this court had been over him.

A verdict has determined that the Little Ing is the close of the plaintiff; and it is now therefore established that after the injunction issued, these defendants had taken the plaintiff's property. The necessary consequence is, that all which has been taken has been taken by wrong; that of all which has been taken since the injunction was dissolved, a clear account ought to be rendered; an account free from difficulty. The account was prayed and granted accordingly, with the proper directions as to allowance and costs, which justice between parties under such circumstances prescribed; and that has produced this report, establishing the facts, that the defendant, White, imprudently considering himself as having no concern with it, taking no care that what had been wrongfully obtained was made good, but placing a most unwarranted confidence in his agents and lessees, the thing proceeds in such a way that books were fabricated; the produce of the different mines mixed; no distinct accounts kept; workings allowed to fall in, and cavities filled up, so that I have no means of charging the defendants with the fair amount of what they have taken; and the master, speaking of the evidence, represents that, by contrivance, it has become impossible to discover what would be the result of a fair and just account of the produce of the Little Ing.

What then is the conclusion? If a man, by his own tortious act, makes it impossible for another to ascertain the value of his property, and that in a transaction in which the former was not merely under an implied moral obligation, but pledged by a solemn undertaking in a court of justice, that such should not be the state of things between them, by those means preventing the guard which the court would have effectually interposed, is the argument to be endured

that, as the party so injured can not distinguish his property, therefore he shall have nothing? That is not the law of this country, as administered in courts either of law or equity. The case of the diamond ring, found by a poor boy, proves the contrary. He had not the means of showing the value. The person who took it from him by wrong, prevented the jury from ascertaining the value, by production of the ring or other evidence. Therefore, as it was proved that the plaintiff's evidence had been destroyed by the act of that person, who ought to have refrained from placing the transaction in that state, the Lord Chief Justice directed the jury to find that the stone was of the utmost value they could find, upon this principle: that it was the defendant's own fault, by his own dishonest act, that the jury could not find the real value.

The case of *Panton* v. *Panton* applies to this. A clerk in a banking house at Chester remitted his own money, with that of his employer, to an agent in London, to be laid out upon security; and, by management, the securities were so changed, that the property could not be distinguished. The court of exchequer held that the confusion being occasioned by him who so dealt with the property, the distinction lay upon him; and if he could not distinguish what was his own, the whole must be considered as belonging to the other.

A principle, not dissimilar, though not precisely the same, governed me in the case of Mr. Jackson's executors. There was no more duty imposed upon him than upon these individuals. He had kept the account, and, as it appeared to me, not incorrectly, upon his own side; but, having kept it only upon his own, though bound to keep it upon the other side, it was held that he could not maintain a demand, to which under other circumstances he would have been fairly entitled. The decision was made, not upon the notion that strict justice was done, but upon this: that it was the only justice that could be done; and that no more could be done was the fault of Jackson himself; who, if he did not enable those parties to know what demand they had upon him, could not be heard to say he had any demand upon them.

Upon a principle of the same sort I ventured to go in the case of the late Lord Chedworth (8 Vesey, 46). Some part of the property clearly belonged to Edwards, the steward; and I

thought myself entitled in the first instance, to lay an injunction upon the whole fund. I do not advert to the case of the horse (*Newman* v. *Payne*, 2 Vesey Jr. 203), before Lord Loughborough, or to that of the dog, before me in the Court of Common Pleas; as it is perhaps doubtful, where the law declares distinctly that the value of the animal shall be given, whether a judge is justified in directing a jury to give a sum far exceeding the real value. Those cases, however, do not interfere with the others.

This report presents to the court a case of violation of property, previous to the injunction; giving the right to and account upon ordinary principles. After the injunction was dissolved, the defendants were permitted to use this mine upon a pledge of good faith to this court, that a clear account should be produced, and that the plaintiff should have no difficulty in ascertaining his property. If, at the hearing, it had been stated to me that there would be any difficulty, I should probably have said at once that it should be, not on him, but on the defendants; and that if they did not distinguish what was his, all should be taken to be his. What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity; but if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them, the other party can not tell what was the original value of his property, he must have the whole; and the principle goes to the full extent of what is now contended. Regretting the consequences in this instance, to one of the parties, who is made answerable only for inattention to his own interest, I believe there is no greater violation of property in this country, than of property of this nature.

It is said, if the whole is to be understood to be the produce of the Little Ing, except so far as any part can be shown to be the produce of the Prosperous mine, the effect is to determine that the whole must be considered as the produce of the former; unless a special direction is given, that these books are to be received in evidence before the master. There are, I admit, many cases, in which this court, giving an account, directs it to be taken with the admission of certain documents

or testimonies, not having the character of legal evidence. If parties have been permitted for a long course of years to deal with property as their own, considering themselves under no obligation to keep accounts, as if there was any adverse interest, having no reason to believe the property belonged to another, though it would not follow that, being unable to give an accurate account, they should keep the property, yet the account would be directed, not according to the strict course, but in such a manner as under all the circumstances would be fit. The case, however, is widely different, where both parties knew that the property was the subject of adverse claim; and those who desire to have the rules of evidence relaxed, had undertaken that there should be no occasion for deviating from the strict rule; that there should be clear accounts; that the other party should have the property without hazard of loss from the want, or complication of accounts. In a case of this nature, a previous direction to the master to receive such evidence, would introduce a most dangerous principle. The utmost length I can go in such a case is, to give liberty to either party, if the master, in taking the account of the produce of the Prosperous mine shall find difficulty as to receiving any evidence to apply to the court for directions upon that particular point. It is perfectly clear that such a reservation will be necessary as to these books, even not considering the imputation which is cast upon them by the master's report; but the fact that better evidence will be wanting, is not sufficiently clear to warrant a prospective direction to the master to receive them.

The circumstance that this difficulty, cast upon the plaintiff in recovering his right, is the consequence of the breach of an engagement with this court, binds me to give even this relief, at the cost of the defendants. I do not mean that if anything culpable should arise before the master, upon the other side, that those costs should be included; but with that exception, this relief should be given with costs; as it is proper to mark such a case upon the contract of individuals with the court itself.

The decree was accordingly made, directing the account as it was prayed; charging the defendants with the whole net produce, except what they shall prove to have been taken from

the Prosperous mine; with all the costs of that inquiry, except as to anything that may occur, blameable on the part of the plaintiff, in the course of it with costs; and a special direction, that if any question as to the admission of evidence, should arise before the master, in the course of the inquiry directed, either party should be at liberty to apply to the court for directions upon such point of evidence.

REDINGTON v. CHASE.

(44 New Hampshire, 36. Supreme Court, 1862.)

Conversion by mixing, melting and manufacturing. The manufacture, by one of the tenants in common, of iron into iron-ware, after first sorting the iron with other iron, so that the common property could no longer be traced or identified, is a conversion of his co-tenant's share, with or without sale of the goods manufactured.

The following report of the auditor was made, by consent of parties:

"In the spring of 1856, E. B. Parker, J. M. Spooner and the firm of H. C. Redington & Co., plaintiffs in this action, bid off, at a sheriff's sale in Franconia, on their joint account, a quantity of shot iron, at $2 per ton. The iron was subsequently weighed off to the parties by a servant of the sheriff, who reported the weight of the iron to be 58,061 pounds, or 29 tons and 61 pounds; and the said parties paid the sheriff for that quantity at the aforesaid price, paying one third each. Parker and Spooner afterward sold each his one third of the iron to one Wilcomb, who sold the same two thirds to the defendants.

"The quantity of iron which Parker and Spooner assumed to sell to Wilcomb, was two thirds of 29 tons and 61 pounds, as was stated in the verbal contract of sale, and Wilcomb assumed to sell to the defendants the same quantity, to wit, two thirds of 29 tons and 61 pounds. The fact of the sale to the defendants was made known to the plaintiffs, who assented that the defendants might draw away two thirds of the iron, but requested them to leave one third of an average

quality. The defendants drew away, between July 1st and December 1st of that year, 1856, 37,730 pounds of the iron and no more, that quantity being all which they found there. The plaintiffs never had any part of the iron, and there was no evidence introduced by either party tending to show that any part of the iron had been taken by anybody except the defendants as above stated.

"At the time of the aforesaid sales, and until the drawing away of the iron was nearly completed, it was supposed by all parties that the whole quantity of iron was 29 tons and 61 pounds. No division of the iron between the several owners was ever made. When the defendants' teamster, one Rowland, went to draw away the iron, said Parker, who lived in the immediate vicinity, showed him the iron and gave him some directions as to the place or places from which he should take it, and in the course of the drawing told Rowland that the defendants were to have two thirds of 29 tons and 61 pounds, as he, Parker, had understood from Wilcomb. When Rowland found that the whole quantity of iron was less than two thirds of 29 tons and 61 pounds, he reported the facts to Parker, who said 'you will have to take the whole of it then;' and Rowland did so. It did not appear that Parker had any authority whatever from the plaintiffs to give such directions, or any directions, and his actions in that particular was never subsequently sanctioned or ratified by the plaintiffs.

"On the 31st of December, 1856, Wilcomb paid to Parker and Spooner a small balance then due them, and took their receipt for the same, 'in full for 37,730 pounds of shot iron.' The shot iron so taken by the defendants was applied by them to the only use, so far as appeared, to which it is ever applied, namely, it was mixed with other iron, and the mixture manufactured into various kinds of iron ware, so that the shot iron could not in any manner be identified or traced. The articles so manufactured were sold or disposed of prior to October, 1857.

"Before the commencement of this suit the plaintiffs called upon the defendants several times, and requested them to account to the plaintiffs for the plaintiffs' share of the shot iron, which the defendants refused to do, claiming that they had taken no more in quantity than they bought of Wilcomb, and

denying any liability to account to the plaintiffs in any form, for any portion of said shot iron.

"If, upon the foregoing facts there was a conversion of any part of the iron by the defendants, I find the defendants guilty, and assess damages in the sum of seventy dollars and forty-two cents ($70.42), upon which sum interest is to be cast from the date of the writ. If there was no conversion, I find the defendants not guilty."

The questions of law arising from the foregoing auditor's report were reserved to the law term of the court.

FARR, for the plaintiffs.

HIBBARD, for the defendants.

BARTLETT, J.

The plaintiffs owned an undivided third part of the shot iron. The whole was taken by the defendants, who had purchased the other two thirds, and by them mixed with other iron, and manufactured into various kinds of wares, so that the shot iron could no longer be traced or identified; and these wares were sold or disposed of by the defendants. We think these acts of the defendants placed the common property as completely beyond the plaintiffs' reach, as the destruction of it would. The case differs from *Fennings* v. *Grenville*, 1 Taunt. 241, where the extraction of the oil from the whale was in fact a preservation of the common property. There the chattel was turned to its common and profitable use—to the only use ultimately intended or valuable—and although the form was altered, the change would not prevent the other tenants from taking and using it, and without this change the common property must have been lost, but here was a conversion of the entire property to the defendants' use, made under circumstances from which no authority could be implied, and of such a nature that the plaintiffs could not afterward take or use the property. It would, therefore, be unnecessary to inquire whether a sale of the entire property by one tenant in common is a conversion, if that were an open question in this State: *White* v. *Brooks*, 43 N. H. 402. We are of opinion that there was a conversation of the plaint-

iffs' share of the iron, and there must be judgment for the plaintiffs on the report.

1. Mixture of oil in tanks by third party is not confusion: *Wilkinson* v. *Stewart*, 85 Pa. St. 255; *Post* REPLEVIN.

2. Mixture of oil in pipe lines, not confusion: *Hutchison* v. *Com.*, 82 Pa. St. 482; *Post* CRIMES.

3. Confusion, preventing recovery, based on a destruction of the "measure of sufficiency" on a drainage contract: *Pringle* v. *Taylor*, 2 Taunt. 150; *Post* CONTRACT.

4. Mixture of coal got from various seams: *Rokeby* v. *Elliot*, L. R. 13; Ch. Div. 277; *Post* LEASE.

YOUNGMAN ET AL. v. LINN ET AL.

(52 Pa. St. 413. Supreme Court of Pennsylvania, 1866.)

Rescission—Time—Non-user. M., in 1840, sold to H. the exclusive right to mine, etc., on part of his land, at a named rate per ton of ore; in 1851 M. sold his whole tract to Y. and took a mortgage for the purchase money, part of which was payable on a day named, "upon consideration that the title to the land be by that time assured and confirmed"; and particularly that the above mentioned agreement with H. be rescinded, otherwise not to be payable till the title was fully assured. A *scire facias* upon the mortgage was sued out May 2, 1864, and tried Dec. 22, 1864. *Held*, that no presumption of abandonment of H.'s right under the agreement by reason of non-user, had arisen either at the commencement of the suit or at the trial. In 1840 the right began, but as it was in 1851 by the terms of the mortgage treated as a subsisting incumbrance, the court must consider whether there has been a lapse by non-user since the last mentioned date. And it must be treated as still not "rescinded," as required by the terms of the mortgage, notwithstanding the judicial construction given to this same agreement of H., wherein it was declared lapsed in a case between other parties (*Clement* v. *Youngman*) in this same court.

Error to the Court of Common Pleas of Union County.

This was a *scire facias* upon a mortgage, issued May 2, 1864, by James F. Linn and Levi Sterner, executors, etc., of Nicholas Mensch, deceased, against John Youngman and Jesse M. Walter.

On the 1st of April, 1851, Mensch sold to Youngman and Walter a tract of land. Part of the purchase money was secured by the mortgage in suit, of which $6,000 was to be paid "three years after the death of said Nicholas Mensch, and upon the further consideration that the title to the land this day sold and conveyed by the said Mensch to the said John Youngman and Jesse M. Walter be by that time assured and confirmed, and particularly an agreement between the said Mensch and one H. Hughes, dated the 17th of November, 1840, be rescinded, otherwise not to be payable until said title be fully assured"; the interest, however, thereon was payable yearly, and has been paid.

Mensch died October 4, 1854. The agreement referred to granted to "Hughes, his heirs or assigns, the exclusive right

and privilege of searching for, digging, raising and carrying away from off the lands hereafter described" being part of the tract conveyed to defendants, "all the ore," etc. This agreement through various assignments passed to Clement and Masser, who, November 28, 1854, brought an ejectment against the defendants "for a certain limestone quarry containing about three acres," part of the land included in Hughes' agreement. In that suit there was a verdict and a judgment for the defendants, which was affirmed by the Supreme Court: 4 Wright, 341. The record of this judgment was offered in evidence by the plaintiff and received, and exception taken by the defendants. There was no evidence of any use having been made by Hughes or his alienees of the rights granted by the agreement. By direction of the court the jury found for the plaintiff $5,635.80.

The errors assigned were the admission of the evidence and the instructions to the jury as contained in the specifications, viz.: 2. "It is now some twenty-four years since this agreement was made, and they (Hughes and his alienees) have lain by so long that they have forfeited any right they might have had under the agreement; this, then, being the case, and this agreement having become null and void, or rather a presumption having arisen from lapse of time that this agreement was released or given up, the plaintiffs have in effect complied with their stipulation in the condition of the bond, and are entitled to recover the balance of this bond, to wit, $5,400 and interest from April 1, 1864."

3. "The facts as exhibited in the cause amount to substantial compliance with the proviso, and, therefore, the plaintiff is entitled to recover."

4. "The title, as appears in this case, has already become assured to the defendants."

5. Refusing to instruct the jury "that plaintiffs having neither averred or proved that the agreement of the 17th day of November, 1840, between Holker Hughes and Nicholas Mensch, is rescinded, can not recover."

6. Refusing to answer the defendants 4th point "that no evidence having been given by plaintiff of non-user, they can not rely upon the limitation of twenty-one years elapsing since the date of the agreement, as fulfilling their obligation

to have the Holker Hughes agreement rescinded, and the title to the lands assured and confirmed to the defendants."

JOHN B. LINN, for plaintiffs in error.

G. F. MILLER, for defendants in error.

WOODWARD, C. J.

This was a *scire facias* upon a purchase money mortgage. The defense was an outstanding interest or incumbrance in one Holker Hughes, to whom Mensch, the vendor, had made articles of agreement on the 17th November, 1840, conveying to said Hughes, his heirs or assigns, the exclusive right and privilege of searching for, digging and carrying away from part of the land included in the subsequent sale to Youngman and Walter, all the iron ore and limestone on said land, and timber for working the mines or quarries and roads to and from them, and ground for landings and deposits of dirt, and for necessary houses and buildings; Hughes to pay 20 cents a ton for all the clean ore he should take. Holker Hughes assigned this contract to Napoleon Hughes, who recorded it on the 30th September, 1841. Napoleon Hughes conveyed his interest by deed to Jacob Barnhart, April 17, 1852, who conveyed by deed of June 8, 1852, to Ira T. Clement and Jacob B. Masser. These deeds were duly recorded.

The sale of Mensch to Youngman and Walter was made on 1st April, 1851, of 300 acres in consideration of $18,000, part in cash, and the balance secured by bonds and mortgage. All the bonds have been paid except one conditioned for the sum of $6,000, which was payable three years after the deed of Mensch, "provided the title to the land this day sold and conveyed by the said Mensch to the said Youngman and Walter, be by that time assured and confirmed, and particularly an agreement between the said Mensch and one H. Hughes, dated 17th November, 1840, and recorded in Union county, in Deed Book J., p. 397, be rescinded, otherwise not to be payable until the said title be fully assured, as per bond, said bond bearing interest from this date, the said interest to be payable yearly and every year to said Nicholas Mensch and his assigns."

I have taken the words of the condition from the copy of the mortgage before us except the word "time," which, I presume, was omitted by mistake in copying the original instrument. The same condition, in very nearly the same words, is in the bond. Mensch died October 4, 1854, and his executors sued out the mortgage to enforce the payment of the bond on the 4th May, 1864, nothing whatever having been done to rescind the agreement made with Hughes.

It was upon this ground (the non-extinguishment of that agreement) the defense planted itself.

On the trial of the cause the plaintiff offered, and the court admitted against the objections of the defendants, the record of an ejectment brought in 1854 by Clement and Masser against Youngman and Walter "for a certain limestone quarry containing about three acres," understood to be part of the premises mentioned in the mortgage. A verdict and judgment for defendants were entered in 1856, which were affirmed in this court in 1862; see 4 Wright, 341.

In view of the judicial construction which the agreement of Mensch with Hughes received in that case, and the lapse of time, the court charged that the agreement was released or given up, the plaintiffs have in effect complied with their stipulation in the condition of the bond, and are entitled to recover.

In Pennsylvania the general doctrine has prevailed ever since the case of *Steinhauer* v. *Witman*, 1 S. & R. 438, that if the consideration money for land has not been paid, the purchaser, unless it plainly appear that he has agreed to run the risk of the title, may defend himself in an action for the purchase money by showing that the title was defective, either in whole or in part, whether there was a covenant of general warranty or of right to convey, or quiet enjoyment by the vendor or not, and whether the vendor has executed a deed of conveyance for the premises or not. This, indeed, was precisely Judge Kennedy's mode of stating the doctrine in *Roland* v. *Miller*, 3 W. & S. 393. In *Murphy* v. *Richardson*, 4 Casey, 292, we brought together the cases in which this doctrine has been somewhat qualified, and we adopted Judge Gibson's summary of the authorities as found in *Lighty* v. *Shorb*, 3 Penna. R. 447, to the effect that where there is a

known defect, but no covenant or fraud, the vendee can avail himself of nothing, being presumed to have been compensated for the risk in collateral advantages of the bargain; but where there is a covenant against the known defect, he shall not detain purchase money unless the covenant be broken; the cases that are scattered through our books are all referred to in the cases above mentioned, and I will not incumber my page by a repetition of the references.

It is observable that the defense here can not be treated as a mere equity, as in *Beaupland* v. *McKeen*, 4 Casey, 130, but that it is a strictly legal defense that springs out of the very terms and conditions of the mortgage. The defect in Mensch's title was known to his vendees, for Hughes' deed or agreement was on record and is precisely recited in the mortgage. Whether any covenant was inserted in the deed to them, we are not informed, but the condition in the mortgage amounts in effect to a covenant on the part of the vendor that Hughes' right under the agreement of 17th November, 1840, shall be extinguished before the $6,000 bond shall be payable. By the very terms of the instrument this bond was to be paid three years after the death of the vendor, *provided*, that is, on condition of further assurance, and especially on condition that the Hughes' agreement be rescinded, if no further assurance, and especially if that agreement be not rescinded, then, though the interest on the bond is to be paid annually, the principal is not to be demandable; such is the plain legal import of the condition; and it was precedent to the right of the executors to recover, if not to sue, for the balance of the purchase money. They stand like a vendor under a covenant against a known defect after breach of the covenant, and their breach is alleged as a legal defense against their action. So far as appears to us, neither Mensch in his life-time nor his executors since his death ever put forth an effort to rescind the agreement. The ejectment of Clement and Masser was *res inter alios acta*, to which the executors were not a party, and the effect of that suit was not to rescind the agreement. It was a mistake, therefore, to admit it in evidence. The only ground then upon which the court's opinion can rest is, that the rights of Hughes' alienees under the agreement were barred by non-user. Let us see how this is.

From the date of the agreement to the institution of the ejectment was fourteen years, without any adverse possession of the land for *mining purposes*, a period quite too short to bar the right or to raise a presumption of abandonment. But for the purposes of the present suit we are to treat the agreement as the parties treated it, as a subsisting incumbrance in 1851, eleven years after its date. Nothing can be more express than their recognition of the existence of the agreement at the date of their papers on the 1st April, 1851, and they contemplated its continued existence until a period three years after Mensch's death. He died in 1854, and three years thereafter would bring the agreement down to 1857, when it was to be rescinded as a condition precedent to the payment of the money now in suit. Between the date and the institution of this suit was only seven years, and such a period could give birth to no such presumption as the learned judge set up.

On the contrary, the parties have treated the agreement as an incumbrance existing down to so recent a date as absolutely to exclude all legal presumptions of its extinguishment, and it was a very substantial incumbrance, one that would materially impair the marketableness of the title; if the case stood upon executory articles of sale and purchase, no chancellor would compel the vendee to accept and pay for a title with so substantial an interest outstanding. It is more than a cloud upon the title, it is a conveyance of valuable rights in the land, be they corporeal or incorporeal. And the positive engagement that these rights should be extinguished before this balance of purchase money should be demanded, makes this a much stronger case than *Nicol* v. *Carr*, 11 Casey, 382, or *Murphy* v. *Richardson*.

The judgment is reversed and a venire facias de novo awarded.

PENNIMAN v. WINNER.

(54 Maryland, 127. Court of Appeals, 1880.)

Contract contradicting terms of sale. Plaintiff sold an oil well and oil lands adjacent for a consideration part paid in cash, part in stock, and

the balance by the note in suit, as evidenced by written contract. The note was afterward delivered to defendant for collection. In an action of trover brought against him for its conversion he offered to prove that it was parcel of the terms of sale that plaintiff should contribute toward the purchase money in proportion to his stock, and that the note was left with defendant upon the understanding that such amount was to be credited on the note. *Held*, that the evidence was inadmissible, being in derogation of the written contract and of the note itself, and not a collateral contract.

Failure of oil well. The fact that an oil well sold, fails to produce enough to justify working it, is not a failure of consideration.

Misrecital of note instead of agreement. Where an instrument is not strictly a promissory note, owing to uncertainty in the amount expressed to be paid, the assumption by the court in its instructions that it is a note, is not error, where the measure of recovery is the same, whether it be styled a note or an agreement to pay money.

Measure of damages for converting securities. The measure of damages in trover for conversion of a note (or agreement to pay money) is the amount of plaintiff's interest in the same.

Joinder of counts in trover and assumpsit. It is no ground for a motion in arrest of judgment that defective counts in assumpsit are joined with a good count in trover.

Defective common counts. The words "money payable," are material in the count for money received. A count for "amounts stated" will not be treated over objection as for "accounts stated."

Appeal from the Circuit Court for Howard County.

The case is stated in the opinion of the court.

First exception, stated in the opinion of the court.

Second exception. The plaintiff offered the two following prayers:

1. That if the jury find from the evidence in the case, that the plaintiff and defendant were joint owners of a promissory note, drawn by the Rockland and Venango Coal Oil Company, and dated the 21st day of January, 1865, for $5,000, and payable sixty days after the date thereof, and that the plaintiff, into whose hands said note was given by said company for valuable consideration (if the jury shall so find), delivered the said note to the defendant for collection, and that the defendant, without the authority or consent of the plaintiff, surrendered the said note to the Rockland and Venango Coal Oil Company, the drawers of said note, for cancellation or destruction, then the plaintiff is entitled to recover in this action such amount as the jury may find to have been the

plaintiff's interest in said note at the time of such conversion, unless the jury find the facts stated in the defendant's third prayer.

2. That the true measure of damages in this action is the value of the plaintiff's interest or share in said promissory note referred to in the first prayer (if the jury find the facts to be as herein stated), at the time of the conversion of the same (if they find such conversion), together with legal interest thereon from the date of the conversion of the said note.

And the defendant offered the three prayers following:

1. That if the jury find from the evidence that the plaintiff authorized the defendant to surrender the note of January 21st, offered in evidence, to the Rockland and Venango Coal Oil Company, their verdict must be for the defendant.

2. If the jury find that the Rockland and Venango Coal Oil Company, mentioned in evidence, was desirous to add to its property an oil well already actively producing oil, with a view of furnishing oil from such well to the market to improve the value of its stock, while engaged in exploring for oil on its other property; and if they shall find that the plaintiff was aware of such purpose and desire on the part of said company, and that he represented to said company that the Blakely well, mentioned in evidence, was an active producing oil well, and that it had been for some time, and was then yielding from six to ten barrels of oil daily; and if they find that a well which would produce at that rate was suitable for the purpose of the company, and that plaintiff represented that said well was suitable for the purpose for which said company desired to purchase an oil well as aforesaid, and that he offered to sell said Blakely well to said company as being such a well as the company wanted, and suitable for the said purpose of said company; and if they shall further find that said company, relying upon the representations of said plaintiff as to the said well, and its fitness for the purpose for which said company desired to buy a well, purchased said well from the plaintiff, and that the note for $5,000, mentioned in evidence, is part of the consideration for said purchase; and if they further find that said well was in fact wholly unfit for the purpose for which they may find said company purchased the same and for which they may find the plaintiff sold

the same as aforesaid, and that it wholly failed to answer the purpose of said company by reason of its not being such a well as the plaintiff had represented it to be as aforesaid, and that the said company, upon discovering that said well was so wholly unfit for the purpose for which it was bought and for which the plaintiff offered to sell and did sell the same (if the jury so find), offered to rescind said contract and to reconvey said property, and demanded a return of the part of purchase money paid (if the jury find that any was paid), and refused to pay said note for $5,000, and that this suit was brought after such action on the part of the company, then the plaintiff is not entitled to recover.

3. If the jury find that the plaintiff falsely and fraudulently represented the oil producing capacity of the Blakely well to the agents of the Rockland and Venango Coal Oil Company to be greater than it really was, with intent to deceive said agents, and to induce said company to purchase the same, and by means of such misrepresentations induced said company to purchase the same, and that said company relied upon such representations in purchasing the same, and believed them to be true, and had not at hand the means of ascertaining their falsehood, and that after the discovery by said company of the falsity of said representations they refused to pay the note in question, which was given in part consideration for said purchase, and offered to reconvey said well property to the plaintiff, then the plaintiff is not entitled to recover in this action.

The defendant also offered the following qualification to the plaintiff's second prayer:

The defendant prays the court to instruct the jury as a qualification to the plaintiff's second prayer that should the jury find for the plaintiff under his first prayer, in estimating the value of the plaintiff's interest in said note, they are confined to the interest he had therein at the time the suit was brought and that in ascertaining the value of said note, the jury are to take into consideration the ability of the Rockland and Venango Coal Oil Company to pay its debts at the time of the alleged conversion, and all the evidence offered as to the means, resources and debts of said company.

The court (MILLER and HAMMOND, JJ.) granted the plaintiff's

first prayer, and his second prayer in connection with the defendant's modification thereof, which was also granted, and the first and third prayers of the defendant, and rejected his second prayer.

The defendant excepted, and the verdict being against him, he made a motion in arrest of judgment for the following reason:

"That the declaration filed in the case contains three counts; the first thereof being a count in trover to recover for the alleged conversion of the promissory note therein mentioned; the second and third counts in said declaration being counts in assumpsit. And the defendant says, that said declaration is defective by reason of the joinder therein of a count in an action *ex delicto*, with two counts in an action of *assumpsit*, and that no judgment can lawfully be entered upon the verdict rendered in said cause."

The court overruled the motion in arrest, and judgment being entered for the plaintiff, the defendant appealed.

The cause was argued before BARTOL, C. J., ALVEY, ROBINSON and IRVING, JJ.

CHARLES MARSHALL, for the appellant.

HENRY E. WOOTTON and WM. PINKNEY WHYTE, for the appellee.

ROBINSON, J., delivered the opinion of the court.

The appellee, Winner, sold to the Rockland and Venango Coal Oil Company, an *oil well* and oil lands adjacent thereto for twenty thousand dollars, the purchase money to be paid as follows: Ten thousand dollars cash, note at sixty days for five thousand, and five thousand dollars in the stock of the company.

In pursuance of these terms, the sale was duly consummated, and the property was conveyed to the company.

The note for five thousand dollars was subsequently delivered to the defendant for collection, and this suit is brought against him for its conversion.

At the trial the defendant offered to prove as one of the conditions of the sale and purchase, an agreement on the part

of the plaintiff to contribute toward the payment of the purchase money, in proportion to his stock in the company, and that the contribution should be retained out of the amount due on the note. And also to prove that the note was left with the defendant for the purpose, and with the understanding that when the amount of such contribution should be so ascertained, it was to be allowed as a credit on the note.

It was not competent, of course, for the defendant to prove an *oral agreement* contradictory of, or inconsistent with, the written terms of sale; but it was argued that such evidence was admissible to prove a *collateral agreement.* A party, it is true, may prove a collateral agreement, provided such agreement be not inconsistent with the written contract, and such are the cases of *Basshor, etc.*, v. *Forbes*, 36 Md. 154, and *Fusting's Exrs.* v. *Sullivan*, 41 Md. 162, and *Erskine* v. *Adlane*, L. R. 8 Ch. 766.

But in this case the property was sold for twenty thousand dollars, and the contract of sale provided how, and in what manner, the purchase money was to be paid. The note, for the conversion of which this suit was brought, is for the payment of five thousand dollars, and it is plain, therefore, that the evidence offered by the defendant is not only inconsistent with the written terms of sale, but is also inconsistent with the note itself. It sets up a contract altogether different from the written contract of the parties, and the evidence was therefore clearly inadmissible.

The second exception brings up for review the rulings of the court, upon the several instructions offered by the plaintiff and the defendant.

The appellant rested his defense mainly on two grounds: 1st, the fraudulent representations of the appellee in regard to the oil-producing capacity of the well, and 2d, the failure of consideration.

In regard to the first, the court instructed the jury, that if the plaintiff *falsely and fraudulently represented* the oil-producing capacity of the well to be greater than it was for the purpose of inducing the company to purchase the same, and the company made the purchase upon the faith of such representations, and had not the means at hand of ascertaining whether they were true or false, and upon discovering that

such representations were false, offered to re-convey the property to the plaintiff, then the verdict must be for the defendant. No objection is made to this instruction, but the defendant contends that the court erred in refusing his second prayer. This prayer assumes that if the company was desirous to add to its property, an oil well already actively producing oil, with a view of furnishing oil from such well to the market to improve the value of its stock, while engaged in exploring for oil on its property, and that the plaintiff was aware of this purpose, and represented the well in question as an active producing oil well, yielding from six to ten barrels of oil daily, and as such suitable for the purposes of the company; and the company relying upon such representations, purchased the well from the plaintiff, and that the note of $5,000 is part of the consideration of said purchase; and if they shall further find that the well was in fact wholly unfit for the purposes for which the company purchased it, and for which the plaintiff sold the same, and that the company upon so discovering it to be so wholly unfit, offered to re-convey said property and to rescind the contract, and demanded a return of the cash part of the purchase money, and refused to pay said note of $5,000, then the plaintiff is not entitled to recover.

This instruction, which seems to us to embrace certain elements of both fraud and warranty, is supported, solely on the ground that the facts therein set forth, if found by the jury, show, an *entire failure of consideration* of the note now in controversy. As between the parties to a promissory note, the failure of consideration may no doubt be relied on as a defense. But there is, in this respect at least, a wide difference between a failure of consideration and a failure of benefit resulting from it. Where one sells and another buys an oil well, and the purchaser gets a well of water only, there is in such a case a failure of consideration. If, however, he gets an oil well, the thing he bought, the fact that it does not yield oil enough to make it profitable to work it, does not constitute a failure of consideration upon which he may rely as a defense in a suit upon a note given on account of the purchase money. In such a case he must rely upon his *warranty* or *fraud*.

The text in Benjamin on Sales, 309, that there is no such

thing as a failure of consideration where the buyer has got that which he bargained for, although the subject-matter of the sale may turn out to be a thing of no value, is sustained by decided cases: *Hall* v. *Conder*, 26 L. J. C. P. 138; *Young* v. *Cole*, 3 Bing. N. C. 724; *Gomperts* v. *Bartlett*, 23 L. J. Q. B. 65; 1 E. & B. 849; 8 C. B. 373; 4 Bing. 373.

The thing sold here was an oil well, and it is admitted the company got an oil well, but the objection is that it wholly failed to answer the purposes for which it was bought.

It did not yield enough to justify working it. This fact, however, does not constitute a *failure of consideration* as relied on by the defendant, and there was no error therefore in refusing the second prayer.

It was further urged, in argument, that the instructions granted by the court are erroneous, because they are based upon the assumption that the note or instrument of writing for the payment of five thousand dollars is a promissory note, and it is contended that it is not a promissory note, not being for the payment of a *certain* and *definite sum*.

The company, in the body of the note, agrees to pay the plaintiff five thousand dollars, less his proportion for contribution to the working capital of the company, the said contribution to be in proportion to the shares of stock held by him.

It is an essential element of a promissory note that it should be for the payment of a *certain sum*.

The object of such a note is to represent, to some extent, at least, money itself, and there must be no *uncertainty* or *chance* of *mistake* as to the amount of money of which it thus takes the place and performs the office.

The sum must be stated definitely, and it has been said that the maxim "*Id certum est quod certum reddi potest*," can not be invoked to supply the want of an express certainty on this point. Where, however, the note has not been negotiated, and the suit is between the original parties, the question is more one of *form* than of *substance*, for although it could not be declared on as a promissory note, still it would be evidence of an agreement to pay money, and the plaintiff might frame his declaration accordingly. In such case, by proving the

consideration, he might obtain all the advantages which would belong to the instrument as a promissory note.

This, however, is not a suit upon the note or instrument of writing as a note, but an action of *trover* against a third party for its *conversion*, and conceding, for the purposes of this case, that it is not, strictly speaking, a promissory note, yet it is an agreement to pay money, and as such, a valuable security, for the conversion of which an action of trover would lie. Being a valuable security belonging to the plaintiff, its *conversion* by the defendant is the *gist of the action;* and whether it be a promissory note or an agreement to pay money, or any other valuable security, the measure of damages would be the same, namely, the plaintiff's interest in the thing converted.

The fact, therefore, that the several instructions granted by the court assume that the paper in question is a promissory note, constitutes no ground for reversing the judgment, because in any aspect of the case the measure of damages to which the plaintiff was entitled is correctly stated by the court.

The motion in arrest of judgment was also properly overruled.

The declaration contains three counts:

1st. For the conversion or trover.

2d. For money received.

3d. For money found due *on amounts* stated.

In support of the motion it was argued that the declaration was bad, because it contains a count in trover and one in assumpsit.

Whether counts in trover and assumpsit can be joined is a question not necessary to be decided here, because it is obvious that there is but one good count in this declaration, and that is the one for *trover*.

The second count is defective, because the words for "money payable" are omitted: *Rider* v. *Merryman*, 34 Ind. 100.

Art. 75, Sec. 22, of the Code provides, that the words "money payable," etc., shall precede the money counts.

The third count is defective, because there is no such thing as a count for "money found to be due on *amounts* stated," nor are we at liberty, in the face of the record, and the objection of the appellee to treat it as a count, "for money found to be due on account stated."

Finding no error in the rulings below, the judgment will be affirmed.

Judgment affirmed.

1. The agreement of a trustee of a mining company to resign for a reward promised is *contra bonos mores*, and the consideration not recoverable: *Forbes* v. *McDonald*, 54 Cal. 98.

2. Reception of price amounting to only half the value, not sufficient inadequacy of consideration to set aside execution sale, considering the nature of the property (salt lands), the absence of fraud, and after much delay on the part of plaintiff: *Bradford* v. *McConihay*, 15 W. Va. 732.

PRINGLE v. TAYLOR.

(2 Taunt. 150. Court of Common Pleas, 1809.)

Confusion. If a party entitled under a contract to receive a profit from another, by his own act, so confound the measure of that which he was to receive that it can no longer be ascertained, he vacates his whole claim.

Coal for engine for mutual drainage. Defendant agreed to find sufficient coal for plaintiff's engine to draw water from the mines of both parties, *as they then stood*. Plaintiff sank to a lower seam, in draining which he necessarily drained the other two seams, but consumed for his engine more coal than before. *Held*, that defendant was no longer bound to furnish any coal, because plaintiff had destroyed the measure of sufficiency.

Assumpsit. The plaintiff assigned a breach by the defendant, in not supplying the plaintiff with small coal for the use of his engine, according to the terms of the agreement hereinafter stated; at the trial of this cause before WOOD, B., at the Northumberland assizes, 1808, the jury found a verdict for the plaintiff, with 40*l*.15*s*. damages, subject to be changed for a nonsuit, according as the opinion of the court should be, upon the following case:

The plaintiff was possessed of a seam of coal, called the little coal of Beadnell, in the county of Northumberland, and of a steam engine, which was originally used by him for drawing off water therefrom; the defendant was possessed of a seam of coal contiguous to, and nearly upon a level with the plaintiff's, but had no steam engine for drawing the water therefrom. It was necessary to draw the water from these collieries before they could be worked, and the defendant, before the making of the agreement, was not able to work his coal, except at such times when the engine of the plaintiff had been worked long enough to draw the water from the defendant's as well as the plaintiff's coal.

Upon the 22d of December, 1806, the following agreement was written and signed by the defendant, in the shape of a letter addressed to the plaintiff: "I hereby agree to give you small *coals for your engine, to draw your water from your little coal and my coal as they now stand*, on condition you

keep your engine *where she now stands*, and a person to attend her; you defraying every other expense that necessarily attends such. The above conditions to commence from this day to the 12th November, 1807."

The plaintiff acceded to the terms proposed, and from the making of the agreement to the 12th of November, 1807, regularly kept a person to attend the engine, and kept it at work in the same place, so as effectually to draw the water from the defendant's coal, and defrayed every expense attending the engine, except the coal.

The defendant, from the making of the agreement to the 3d of June, 1807, regularly supplied the engine with coal according to the contract; the plaintiff a little before that time ceased altogether from working his little coal, and opened and worked a seam called the main coal, which lay much deeper than either the defendant's coal or the plaintiff's little coal, and by the sale of such main coal entered into a competition with the defendant, which the defendant deemed prejudicial to his own interest in the market. The defendant from that time refused to supply any more coal for the engine.

From the 3d June to the 12th of November, 1807, the plaintiff supplied the engine, at his own expense, with the whole of the coal necessary to relieve the defendant's coal from water, and did thereby relieve the defendant's coal from water by keeping the water at a level low enough for the working of his own main coal. The verdict was taken for the value of so much coal as upon a fair calculation would have been necessary to keep the engines so long at work as would have been requisite for the mere purpose of keeping the defendant's coal and the little coal free from water.

BEST, Serjt., for the plaintiff.—The defendant assigns as a reason for refusing to furnish coal, that the plaintiff has opened another coal mine, and created a competition against him in the market. But this is an injury which can not be complained of in any court of justice. The only ground he could make to excuse the performance of his contract would be the non-performance of the plaintiff's part. He does not, however, allege that; but objects that it is performed for another purpose than for the drying the plaintiff's little coal mine. It is true that the immediate purpose is to drain a

seam of coal which lies lower; but the plaintiff, therefore, must of necessity drain the upper vein also, and he has a continuing interest in the upper vein. The true construction of the agreement is, that while the engine stands in the same place, and the plaintiff thereby dries the defendant's coal, the plaintiff is entitled to so much small coal as is sufficient to dry it. If in June the plaintiff had ceased to work the engine altogether, the defendant might have sued him. It, therefore, is reciprocal, that the defendant should be obliged to furnish coals till the 12th of November, 1807, whether he wrought for his new vein or his old one. The plaintiff does not contend that he is entitled to demand the greater quantity of coals necessary to draw the water from his lowest mine; and it appears specially on the case, that the jury have not given damages for that quantity, but only for the quantity sufficient to draw the water from the level agreed on. Therefore no injustice is done by the verdict, and it ought to stand.

WILLIAMS, Serjt., for the defendant.—If the agreement had been, as it is supposed to be, that if the plaintiff should, with his engine, draw off the water from the defendant's mine, the defendant would give him a definite quantity of coal to supply the engine, the argument of the plaintiff would be good. But the defendant was not so imprudent as to make this agreement, and he has made a very different one, it is for coal to draw the water from your little coal and my coal as they now stand. If this relative state had continued, and the defendant had refused to supply coal, the action had well lain. But it is material that the case states that the plaintiff had ceased altogether to work the little coal, and had opened the main coal. This alone would have determined the matter; but the case goes further, for it states that the level of the main coal is much deeper, and that the verdict is calculated on that proportion of the whole coal now necessary, which would have been requisite to drain the little vein only. This shows, then, that the verdict is wrong; there was no calculation in the original agreement; it was to find coal for drying the little coal, while that continued to be wrought; as soon as the plaintiff opened the main coal, he should have come to a new agreement, for the old one was at an end.

BEST, in reply.—It is material, that this is not an agree-

ment to last so long as both mines should be wrought, but down to a limited time, the 12th November, 1807. But it is said, the terms so restrict the agreement, that it is to stand no longer than whilst the little coal continues in the same state. But the terms of it are to be taken most strongly against the defendant who pens it; and it therefore still subsists, for the circumstance on which it was to determine was an alteration in the state of one of the then existing mines, not the digging a new one; and those two mines remain in the same state; their levels and the position of the engine are material. Nothing in the agreement restricts the plaintiff from opening other mines than the little coal, or from using the engine to draw the water from other mines beside the defendant's. Here it appears the plaintiff has in a given part of the day exhausted all the water of the defendant's mine, and employed the residue of his force in drying another vein of his own. It is admitted the defendant has had all the advantage he could promise himself under the contract; he therefore ought to pay for it; if the defendant had thought there were circumstances to determine the contract, he ought to have given notice; but he lies by.

MANSFIELD, C. J.

This action is brought for not supplying small coal for the working of an engine to draw water from the mines in the plaintiff's occupation; the declaration states, that in consideration that the plaintiff would keep his said engine where the same then stood, from the 22d day of November, 1806, until the 12th day of November 1807, and would during that time keep a person to attend the same, and would defray every other expense that necessarily would attend such keeping of the said engine, the defendant undertook that he would during the time aforesaid give the plaintiff small coals for the said engine to draw the water from the plaintiff's *said little coal mine*, and from the coal mine of the defendant, *as they then stood*. So the plaintiff himself states, in his first count, that it was to draw water only from his little coal and the defendant's mine, and for no other purpose. This agreement is proved by a letter, which in fact puts an end to the

case. Now what is the letter? "I hereby agree to give you small coals for your engine, to draw water from your little coal and my coal, as they now stand." The word "they" can only refer to "your little coal and my coal," and "now stand" must be interpreted, with reference to the subject-matter, to mean, that so long as the operations of draining which the plaintiff necessarily performed in the pursuit of his own works, were insufficient to keep the defendant's coal dry, unless additional labor was bestowed for that purpose, so long would the defendant supply the engine with coals; and as long as the plaintiff worked only to get his little coal, the defendant did supply him with coal. The plaintiff thought it more advantageous to go to the main seam, which lay much deeper, and therefore required more power to drain it. The defendant says, I will supply you with coal no longer; it is urged that a notice was necessary; but surely it was not necessary to give the plaintiff notice of that which the plaintiff himself did; the defendant, however, refused to supply him, and very rationally; for what possible measure could be taken, to ascertain what coal was necessary to be supplied? A new calculation might be required every day and every week; it would be an everlasting ground of dispute; and who was to decide it? The contract, therefore, was then at an end.

HEATH, J.—I am of the same opinion. The true construction is, that the engine should be worked for draining the mines as they then stood; that is, while they continued in the same train of working; therefore, as soon as the plaintiff began to work a deeper seam, things were altered. LAWRENCE, J., concurred. CHAMBRE, J.—The case is rendered somewhat obscure by what was stated concerning the competition in the market, which has nothing to do with the subject. The plaintiff has rendered the bargain totally uncertain, by altering the state of the circumstances. He has vacated the contract, by rendering it impossible to know what is the measure of sufficiency. The measure may vary every day, or every week, and a new arbitration or action must as often take place.

Postea to the defendant.

WHITE v. TONCRAY.

(9 Leigh, 347. Court of Appeals of Virginia, 1838.)

Record. What constitutes the record at common law, stated.

Pleas rejected. Pleas tendered but rejected by the court are not a part of the record, unless made so by bill of exceptions: a memorandum that the matter thereof might be allowed in evidence, and that this was done at the trial does not make the rejected pleas part of the record.

Idem. If pleas be rejected and no exception saved, the defendant shall be presumed to have acquiesced.

Election as to amount to be delivered. A *carrier* agreed to transport for a *manufacturer* of salt from 1,200 to 5,000 barrels, annually, for three years, from the salt works to certain specified places for a stipulated reward *per* barrel: *Held*, that the *manufacturer*, not the *carrier*, had the right to elect what quantity of salt, not less than 1,200, nor more than 5,000 barrels, should be transported by the carrier annually.

In an action of covenant, brought by Toncray against White, in the Circuit Court of Washington, the declaration set forth a covenant, dated the 25th August, 1823, between the plaintiff Toncray, a carrier, and the defendant White, a manufacturer of salt at Saltville (the name of King's salt works in Washington), to the following effect: That the plaintiff should transport for the defendant, from Saltville, down the Holston and Tennessee rivers, from 1,200 to 5,000 barrels of salt annually for three years next succeeding the date of the covenant, if the state of the water permitted, and should deliver the same safely to the defendant or his consignees, on the top of the bank of the Tennessee, at any point the defendant should direct from Florence below the Mussel Shoals to the mouth of the river, except one third part of the salt so transported, which the plaintiff reserved the right to deliver at Marathron at the head of the Shoals, for the transportation of which the defendant was to pay the plaintiff $25 per ton for all delivered at Florence and below, and $22 per ton for all delivered at Marathron; and for all salt received by the plaintiff at Saltville and not delivered to the defendant or his consignees at some point on the Tennessee, the plaintiff was to be charged $1.25 for each bushel and 46 cents for each barrel containing it, or he was to be charged the Tennessee money selling price at Saltville, in part payment of what should be due to him for the transportation; and the balance due him on that account

should be paid him by the defendant, in Tennessee money, within twelve months from the delivery of the salt to the plaintiff at Saltville to be transported; but if any of the salt delivered to the plaintiff to be transported, should be lost by the staving or the sinking of the boats, on satisfactory proof made thereof by the plaintiff, he should be charged only 50 cents per bushel for the salt so lost, and 46 cents for each barrel containing the same. And, after declaring the intent and effect of the covenant to be, that the defendant should annually during the term of three years, when required, furnish to the plaintiff at Saltville, to be by him transported, *from* 1,200 *to* 5,000 *barrels of salt, at the plaintiff's election, and should keep the quantity of* 5,000 *bushels annually to be transported by the plaintiff, when called for*, and should have consignees ready at all times to receive the salt so transported—the declaration averred, that the plaintiff did, in pursuance of the contract, transport and deliver large quantities of salt, having commenced the day after the date of the covenant, and continued to transport and deliver large quantities until the 19th August, 1825, on which day the defendant refused to deliver any more salt to the plaintiff, whereby the plaintiff was prevented from further performing the covenant on his part; that the plaintiff had made large engagements with wagoners to carry salt from Saltville, and had made expensive preparations for the transportation of the salt, the expense whereof was wholly or in a great measure lost to him, by reason of the failure of the defendant to perform the covenant on his part by furnishing the salt for transportation, and thus the plaintiff had been deprived of the profit he should have made from the contract; that of the salt which the plaintiff had received from the defendant for transportation 605 barrels were lost by the staving and sinking of four boats, whereof he had offered to make satisfactory proof to the defendant, who refused to hear the same; and that the residue of the salt he had received from the defendant had been faithfully delivered, except — barrels, for which he was ready to credit the defendant at the rates fixed by the covenant. And then, averring that the plaintiff had in all things performed the covenant on his part, the declaration alleged the following breaches of the covenant on the defendant's part: 1. That the defendant had not delivered

or permitted the plaintiff to receive, at Saltville, for transportation, from 1,200 to 5,000 barrels of salt annually for the three years, and especially, that he had refused to deliver any salt during the third year of the term, though the plaintiff had elected to take 5,000 barrels during that year, and gave notice thereof to the defendant. 2. That the defendant had not appointed agents or consignees to receive the salt which was transported by the plaintiff, whereby he had been subjected to much expense, and to loss of time; and 3. That the defendant had failed to pay the plaintiff the freight of the salt which he had transported.

The defendant pleaded *covenants performed* and *covenants not broken*, on which issues were made up. And at a subsequent term (the same at which the issues were tried) he tendered "*pleas of set-off*, which were objected to by the counsel for the plaintiff, and rejected by the court." The defendant did not file a bill of exceptions to the rejection of these pleas, nor were the pleas inserted in the record; but there was a *memorandum* at the end of the record, stating, that when the defendant tendered his plea of set-off, the court declared that no objection was perceived to the exhibition of the accounts showing all the defendant's claims to set-offs before the jury, and in point of fact, at a subsequent stage of the trial, his accounts of set-offs were submitted to the jury for their consideration in forming their verdict, except two items in one of them, which were the subject of one of the bills of exceptions filed by the defendant.

Many points arose at the trial and were decided by the court, and the defendant filed four bills of exceptions to opinions given against him; the last of them stated six several propositions, on which instructions of the court to the jury were asked, and instructions given or refused. But of these numerous and various points, this court decided but one (which was the main point in the cause) and that alone, therefore, is necessary to be here stated; namely, the *first* point stated in the defendant's *fourth* bill of exceptions, which was this: the defendant moved the court to instruct the jury, "that according to the legal effect of the covenant, the defendant White had the right to elect what quantity of

salt should be transported, not less than 1,200 nor more than 5,000 by the plaintiff annually, and that the plaintiff had no right to demand for transportation more than 1,200 barrels annually," which instruction the court refused to give, and the defendant excepted.

There was a verdict and judgment for the plaintiff for $4,000, from which the defendant appealed to this court.

JOHNSON, for the appellant, conceiving that the pleas of set-off tendered by the defendant and rejected by the court, and the accounts of particulars therewith filed, were made *by the memorandum respecting them* part of the record, and ought to have been inserted therein to enable this court to judge whether those pleas were properly rejected by the circuit court or not, and suggesting a diminution of the record in that particular, asked a *certiorari* to bring up a full record.

TUCKER, P.—I am of opinion that a *certiorari* ought not to be awarded upon the matter suggested; because, in the first place, I do not think that the pleas of set-off which were tendered by the defendant and rejected by the court are a part of the record; and, secondly, if they were, yet as the defendant acquiesced in the rejection of them, and took no exception, he can not now bring that matter in question before this court.

1. The pleas are not a part of the record. The record, we are told, is made up of "the writ (for the purpose of amending by, if necessary); the whole pleadings between the parties; papers of which *profert* is made or *oyer* demanded, and such as have been specially submitted to the consideration of the court by a bill of exceptions, a demurrer to evidence, or a special verdict, or are inseparably connected with some paper or evidence so referred to. These, with the several proceedings at the rules, or in court, until the rendition of the judgment, constitute the record in common law suits, and are to be noticed by the court, and no others": *Mandeville* v. *Perry*, 6 Call, 78, 83. Now, the pleas which were tendered in this case come within no part of this description. They constitute no part of the pleadings between the parties. The defendant desired to make them so, but the court, for good reasons, doubtless, refused to permit them to be filed. They were, of course, not *filed*. Though placed among the papers

by the party or the clerk, they were not *filed*, and were of course no part of the record. What function could they perform? None. If it was designed to assign the rejection of them as error, the defendant should have filed his exceptions, and thus have identified the papers offered, and have made them part of the record, and afforded the court an opportunity of assigning the reasons of the rejection. He has not done this; he has not even had them so spread upon the record as to identify them. The certificate of the clerk can not supply the defect: *Cunningham* v. *Mitchell*, 4 Rand. 189; *Bowyer* v. *Chestnut*, 4 Leigh, 1. Indeed, they are not to be presumed to be among the papers, as they were rejected, and no exceptions were filed. The defendant not excepting, is taken to acquiesce; and as the court refuses him leave to file his plea, he may put it into his pocket. If he did so, could he be prosecuted for purloining a record? I apprehend not; for when his motion to file a plea is refused, the plea is still in his possession and control, and will so continue unless he elects to compel the court to make it a part of the record, which he may do by bill of exceptions. This seems to me the true view of the matter. If the plea is received, it becomes part of the record at once, by the voluntary act of the court. If the court refuses it a place among the records, which is the effect of the rejection, the defendant may then require it to be made a part of the record by bill of exceptions; or the court may by its order identify the paper, and set forth upon the order book the reasons of its refusal to receive it. This brings me to remark, 2. That even if the pleas had been spread upon the record, and constituted a part of it, this court must take it that they were properly rejected, as the defendant did not except. His acquiescence in the rejection must be presumed; and as it is possible there may have been good reason for the rejection, that reason must be taken to have existed, as he did not call upon the court to sign a bill of exceptions, in which its reasons would have been stated. A contrary practice would lead to absurdity and mischief. If a continuance is refused, or a motion for a new trial overruled, the court must load the record with its reasons, though the party does not except. This would be contrary to reason, and is at war with well established principles and practice. The

rejection, then, in this case, must be taken to be right; and, if so, for what purpose have the pleas inserted in the record? I see no use of them which would avail the defendant, and I therefore do not think the cause should be delayed for that which (if a part of the record at all) is an unimportant part of it, in relation to the questions before this court.

It may also be remarked, that if a bill of exceptions had been filed in the present case, and had merely stated the fact of the rejection of the pleas, without showing any reason for the delay in not offering them sooner, this court, under the authority of the case of *Martin* v. *Anderson*, 6 Rand. 19, must have affirmed the judgment rejecting the plea. The other judges concurred, *certiorari* denied. The cause was then argued on its merits, by JOHNSON, for the appellant, and STANARD, for the appellee.

TUCKER, P.—This is an action of covenant upon a contract between a salt manufacturer and a carrier, for the carriage of a quantity of salt. By the contract, Toncray agreed to transport for White, from 1,200 to 5,000 barrels of salt, annually for three years. The carrier contends, that, by this provision he was entitled to demand that the manufacturer should deliver to him, or have ready for delivery, each year the full quantity of 5,000 barrels, or such quantity between 1,200 and 5,000 as *he* might elect. The defendant, White, denies Toncray's right of election, and on the trial of the cause moved the court to instruct the jury, that *he* and not the plaintiff, had the right of election. The court refused the instruction and, in effect, gave the opinion to the jury, that *the plaintiff had the right of election.*

It is sufficiently obvious, as was said at the bar, that the right of election can not exist in both parties, since the exercise of the right would in that case be conflicting. It is also clear, that as a broad latitude is allowed as to quantity, there must be in one or other of the parties the right to fix the quantity to be delivered for transportation. To which of the parties did that right belong? I answer, to the manufacturer. This will be abundantly clear, whether we proceed upon techincal principles, or upon the reason and nature of the contract. According to well-established principles, the words here being the words of the carrier, are to be taken most strongly against

him. And what then is their meaning? He agrees to transport from 1,200 to 5,000 barrels. The *quantum* is not fixed; but it must be fixed. To allow *him* to fix it, would be to take the words most strongly in his favor. *He* can not, therefore, have the privilege; and as one or the other must have it, the defendant must have it. Indeed, I consider the agreement to transport for White, from 1,200 to 5,000 barrels, as being equivalent to an agreement to transport *any* quantity between 1,200 and 5,000; not any quantity the plaintiff or covenantor might name, but any quantity that the other party might name. For, if the carrier could name the quantity, the contract would in fact not bind him further than the 1,200 barrels; for he can not be said to be bound, who has an election to do or not to do the act. So that though he expressly binds himself to transport *any* quantity within the named limits, he could absolve himself, therefore, by electing to transport a single bushel more than 1,200 barrels. This would be a total perversion of the rules of law.

I am pursuaded, however, that this matter is rather to be decided upon a just attention to the objects and design of the parties, than upon any technical rule whatsoever. It may be difficult to evolve the true principle which should govern such cases; but I will venture the suggestion, that, in general, where a latitude is given in contracts of this description, the right to fix the *quantum* must depend upon the question, what is the principal motive to the contract? And he whose concern constitutes that motion, must have the election in preference to the other party. Thus in a contract for the transportation to market of salt, or wheat, or flour, or coal, or other merchandise, the primary and moving consideration of the contract is the getting the article to the place of sale. The carriage is secondary and dependent. The manufacturers have no idea of doing more than send their own articles. It does not enter into their conception, that they are to look about them, and, if their own stock falls short, to make up the deficiency *aliunde*. An engagement of this character is not made with a view of compelling the manufacturer to furnish employment for a certain number of wagons or boats, but, on the other hand, to bind the carrier to furnish adequate transportation for a quantity, more or less, of produce that is

going to market. Who would ever think of binding himself to employ carriers, when he had nothing to transport? Or more carriage than would be necessary for his transportation? No one. Hence it is, that in such contracts a certain amount is first fixed, and then a latitude is given beyond it to some definite limit. This latitude, in the nature of the thing, is inserted for the benefit of him who has the articles for transportation. How absurd would it be to give to the carrier the power of compelling the employer to pay for more carriage when he had nothing more to carry; the same principles prevail in other cases. If a brickmaker engages with a builder, to burn for him from 500,000 to 800,000 bricks, it is obvious, that the latitude is given because the builder *may* want more than 500,000, and perhaps not so many as 800,000. His wants constitute the true gauge, and he is the person to judge of them. So, if a man offers to build from *five* to *ten* houses for another, the employer must of necessity have a control over the number to be built, since it can not be supposed that he builds merely to furnish employment to workmen. He builds to meet his own wants, and they are the measure of extent to which he is willing to be bound. With the workman it is otherwise, as he can usually expand or contract his operations with comparative facility.

I do not think it necessary to say anything on the other points presented by the bills of exceptions. I am of opinion, that the judgment should be reversed, and the cause sent back for a new trial, at which the first instruction asked by the defendant and stated in his fourth bill of exceptions, should be given by the court to the jury, if again required.

The other judges concurred.

Judyment reversed, and cause sent back for a new trial.

WENTWORTH ET AL. v. COCK, ADMINISTRATOR.

(10 Ad. & El. 42. Court of Queen's Bench, 1839.)

Delivery to administrator, after decease. Plaintiffs entered into an agreement to supply C. with a certain quantity of slate to be manufactured immediately: a further fixed quantity monthly, and a further

quantity monthly as C. might require. C. engaged to receive the slate and the agreement was to be in force till January 1, 1838. *Held*, that plaintiffs might sue the administrator of C. for refusing to receive slate sent in pursuance of the contract, sent after C.'s death, and before the 1st of January, 1838.

Action of assumpsit commenced 16th June, 1837.

The declaration stated an agreement in October, 1836, between plaintiffs and intestate, that plaintiffs should supply to intestate a certain quantity of slate block monthly, to be delivered in London at a specified price; that they should also supply to him immediately from one hundred to one hundred and thirty tons of blocks at the same price, but of different dimensions, and any further quantity, monthly, that the intestate might require. The intestate engaged to receive any quantity of the above mentioned blocks not exceeding two hundred tons per month. The plaintiffs, during their contract with the intestate, were not to supply any other person with blocks of the same description, except for use in the plaintiffs' neighborhood; and the contract was to be in force till 1st January, 1838, unless canceled by mutual consent; the terms of payment to be by bill at four months and discount for ready money. The declaration averred mutual promises and the readiness of plaintiffs to supply the intestate during his life, and the defendant, administrator as aforesaid, since intestate's death, with blocks of the description and at the price agreed upon; and that plaintiffs after the decease of intestate, had sent to London divers tons of such blocks in pursuance of the agreement, and were ready and offered to deliver them to defendant as in the agreement mentioned, and were ready and willing to prepare and deliver the residue; but that defendant did not nor would accept the slate blocks so sent to London and offered to him, or any part thereof, nor pay to plaintiffs the price thereof, though often requested; whereby plaintiffs lost the benefit of the agreement. Plea, that after making the agreement and promise, and before any breach thereof by the intestate, he died.

Verification.

Demurrer and joinder.

WARREN, for the plaintiffs.—The question is, whether this is a personal contract which expired with the intestate, or one

which is obligatory on his representatives. There is a distinction in this respect between acts which do, and acts which do not, require the personal skill of the party in order to execute them. It is only in the former class of cases that the contract is held to be extinguished by the death of the contracting party. There are cases in which contracts even of a personal nature have been adjudged to be obligatory on the executor. Thus an action lies against an executor on an obligation or covenant to instruct an apprentice in his trade "though it sounds as a personal act"; Com. Dig. Administration (B. 14), referring to *Walker* v. *Hull*, Lev. 177, where it was said by the court, on a motion to arrest judgment, that the master's covenant obliged his executors also, "and they ought to see the apprentice taught his trade, and if they are not of the same trade, they ought to assign him to another, who is of the trade, so that he may be taught according to the covenant."

This is a far stronger case than the present. The same principle, viz.: that an executor is liable on his testator's promise, not only to pay a debt certain, but also to do a collateral act, which is uncertain, and rests only in damages, is laid down in Com. Dig. (under the head just cited): *Sanders* v. *Esterby*, Cro. Jac. 417; *Berisford* v. *Woodroff*, Cro. Jac. 404, S. C. as *Berisford* v. *Goodrouse*, 1 Roll. Ry. 433 (more fully), and in *Sheppard's Touchstone*, 482. In *Hyde* v. *The Dean and Canons of Windsor*, Cro. Eliz. 552, it is said "a covenant lies against an executor in every case, although he be not named; unless it be such a covenant as is to be performed by the person of the testator, which they can not perform." In all these cases, the executor is liable though not named: *Hambly* v. *Troph*, Cowp. 371; *Hyde* v. *Skinner*, 2 P. Will. 197. A building contract survives the death of the parties: per COKE, C. J., in *Quick* v. *Ludborrow*, 3 Bulster, 30. The distinction between the contracts of the testator which are extinguished by his death and those which are not, is well put in Pothier on Obligations, Trantes, etc. de Droit Civil, tom. 1 p. 343, ed. 2, 4to, part 3, Ch. 7, Art. 3: "Il y a aussi quelques dettes qui s' éteignent par la mort du débiteur. Telles sont celles qui ont pour objet quelque fait personnel au debiteur. * * * Hors le cas des faits personnels, celui qui a promis de faire quelque chose, et qui est mort sans

l'avoir fait, quoiqu'il n'ait pas été mis en demeure de le faire, transmet son obligation à ses héritiers, qui sont obligés de faire ce que le défunt s'était obligé de faire."

The same principle is adopted by Cod Justinian, Lib. 8, tit. 37, *De contrahendâ et committendâ stipulatione: S. 15*, "*Si quis spoponderit*," *etc.* The general rule is thus laid down in 3 Bac. Ab. 535, Executors and Administrators (P.) (7th Ed.): "It is clearly agreed, that executors and administrators, standing in the place of those whom they represent, shall be answerable for all their debts, covenants, etc., as far as they have assets, and that the testator's covenants shall extend to them, though not expressly mentioned." In *Siboni* v. *Kirkman*, 1 M. & W. 419, PARKE, B., says: "Executors are responsible on all the contracts of the testator broken in his life-time, and there is only one exception with regard to their liability for contracts broken after his death; that is this: that they are not liable in those cases where personal skill or taste is required." The principles now relied upon are recognized in *Marshall* v. *Broadhurst*, 1 C. & J. 403, S. C. 1 Tyr. 348, and *Corner* v. *Shew*, 3 M. & W. 350.

GODSON, *contra.*—This is a personal contract. The intestate was required not merely to pay money, but to exercise a discretion as to the quantity required. The decision in *Marshall* v. *Broadhurst*, 1 C. & J. 403, S. C. 1 Tyr. 348, shows that executors may enforce a building contract: but it does not follow that they are liable upon one. *Corner* v. *Shew*, 3 M. & W. 350, proves that such a contract does not devolve on the executor. *Robson* v. *Drummond*, 2 B. & Ad. 303, shows that even a contract to job a carriage is a personal one, and is confined to the original parties to it.

[PATTERSON, J.—In that case there was an attempt to assign a contract, and to enforce it in the name of the assignee. There was, indeed, a case at Liverpool, where a contract to build a lighthouse was held to be personal, but that was on the ground of its being a matter of personal skill and science.]

LORD DENMAN, C. J.—There is nothing in the defense. The contract leaves no option to the intestate of refusing to take the slate delivered monthly in certain quantities and at fixed prices, or the quantity to be delivered immediately. As

to the further quantity to be delivered if required, the defendant will probably not now require it. This is the only part of the contract on which the intestate could have exercised any choice. It is like any ordinary case of goods ordered by a testator, which the executor must receive and pay for.

LITTLEDALE, J.—No doubt the personal representatives are bound, although not named; and they are bound to pay damages out of the assets, if they do not take the contract upon themselves.

PATTERSON, J.—Concurred.

COLERIDGE, J.—If the contract had been merely to supply what the intestate might require, a different question would have arisen.

Judgment for the plaintiffs.

RODGERS v. LOVE ET AL.

(2 Humph. 417. Supreme Court of Tennessee, 1841.)

Demand. Where from the nature of the agreement a special demand is necessary, but the declaration fails to aver such demand, such omission will be cured by verdict: it will be presumed that a recovery would not have been suffered by the court, unless a special request had been proved.

Continuous supply to forge. Where A was the owner of a furnace, and B of a forge, and A agreed to furnish B with 500 tons of pig metal, as B should need such metal for manufacture, B is not entitled to demand and have delivered to him the whole amount at once: the obligation of supply is limited to the wants of B's manufactory, and B was bound to notify A from time to time of the wants of his establishment.

William R. Love, one of the partners of the firm of W. R. James & Preston Love, having made an affidavit before the clerk of the Circuit Court of Sevier County, that they were unable to bear the expenses of the law-suit they were about to commence, and that they were justly entitled to the recovery of an amount within the jurisdiction of the circuit court, obtained a writ in covenant, against Micajah C. Rodgers, on

the 4th of August, 1838, in accordance with the provisions of the act of 1821, Ch. 22, for the benefit of poor persons: N. & C. p. 533.

This writ was executed, and the court at the August term, 1838, appointed Hynds & Peck, attorneys at law, by virtue of the provisions of the 2d section of said act, to prosecute the said suit for the benefit of said plaintiffs.

The declaration set forth a covenant, signed by Love & Brothers and by Rodgers, which recited, that Love & Brothers had on the 1st day of November, 1836, sold a furnace in Sevier county, to Rodgers, and "in part consideration of such sale, said Rodgers binds himself to furnish said Love & Brothers with what merchantable pig iron they may be able to manufacture into bar iron or blooms, at their forge or forges in Sevier county, not exceeding five hundred tons of pig iron per annum, to be delivered at the furnace aforesaid, as they may need them. And the said Love & Brothers on their part, agree to pay to said Rodgers, one ton of merchantable, well assorted bar iron, for every four tons of pig iron they may get of said Rodgers, payable quarterly, from and after the 1st day of April, at Pigeon Forge or not more than that distance from Sevierville. That is, at the end of each quarter, they are to pay for what pig iron they may have had; and for a violation on the part of either, the party in default shall be liable in damages to the other. The said Rodgers further agrees to let the said Love & Brothers have what metal they may need for their own use at their forge, cast into hammers, plates, stands, etc., at the same price they receive pig metal; the said Love & Brothers paying the molders for casting them, the customary prices. This contract to take effect and remain in force for and during the term of eight years, from and after the 1st day of April next. For the true performance of which, the parties bind themselves in the penal sum of twenty thousand dollars to each other."

And the plaintiffs averred, that the defendant did not furnish the said plaintiffs what merchantable pig iron they were able to manufacture into bar iron or blooms at their forge in Sevier county, not exceeding five hundred tons per annum, delivered to the said plaintiffs at said furnace as they needed them, from the 1st day of April, 1837, to the 1st day of

April, 1838, according to the true intent and meaning of said agreement, and so the plaintiffs in fact say that the said defendant, though often requested to keep and perform his said covenant with the plaintiffs, hath wholly failed and refused, to the damage of the said plaintiffs, eight thousand dollars.

The defendant pleaded that he had kept and performed his covenant, and upon this plea issue was joined.

The cause was continued till the August term, 1840, when it was submitted to the jury, R. M. ANDERSON, Judge, presiding.

It appeared that Rodgers took possession of the furnace under the covenant, but that he failed to supply the forge with metal according to covenant, and that in the second and third quarters of the year, beginning on the 1st day of April, 1837, and ending on the 1st day of April, 1838, the plaintiffs received of the defendant some fifteen tons of pig metal. In the last quarter there were some twenty tons received, some of which were bad metal; that the plaintiffs had two fire places in blast; that Rodgers failed to furnish the pig metal, and that in consequence the forge was idle a great part of the year, etc., and that if kept in employment during the whole year, the profits arising therefrom would have been some seven or eight thousand dollars.

There was much contradictory testimony submitted to the jury in regard to the profits of the establishment if supplied with metal, to the length of time the forge would have been necessarily stopped by low water by the necessity of repairing, etc.

It did not appear that there was a demand made at the furnace for the pig metal, but that a demand was made at Sevierville, in the county of Sevier, and information given that the metal could not be got upon application at the furnace or elsewhere.

The jury, under the charge of the court, rendered a verdict in favor of the plaintiffs for the sum of six thousand dollars.

A motion for a new trial was made by defendant and overruled, and a motion for an arrest of judgment was also made and overruled. The defendant appealed in error to the Supreme Court.

SWAN, for Rodgers.

HYNDS & PECK, for Love & Brothers.

REESE, J., delivered the opinion of the court.

This is an action of covenant. The covenant, among other things, recited that Rodgers purchased of Love & Brothers their furnace, in part consideration of which he bound himself to furnish them with what merchantable pig iron they might be able to manufacture into bar iron or blooms at their forge or forges in Sevier county, not exceeding five hundred tons of pig iron per annum, to be delivered at the furnace aforesaid, as they might need it. And the Loves, on their part, agreed to pay to said Rodgers one ton of merchantable, well assorted bar iron, for every four tons of pig iron they might get of the said Rodgers, payable quarterly at Pigeon Forge, or not more than that distance from Sevierville. That is, at the end of each quarter, they were to pay for what pig iron they may have got. The breach assigned in the declaration is, that defendant Rodgers, did not furnish plaintiffs below with what merchantable pig iron they were able to manufacture into bar iron or blooms at their forge in Sevier county, not exceeding five hundred tons per annum, delivered to the said plaintiffs at said furnace as they needed them, from the 1st day of April, 1837, to the 1st day of April, 1838, according to the tenor and effect, true intent and meaning, of said agreement, although often requested, etc., and to this declaration, the defendant pleaded "covenant performed."

Upon the trial, the court charged the jury that the true construction of the covenant was, that the covenants were mutual and independent covenants. That the provisions of the act of 1807 did not apply to the case; nor was a special request necessary, but the common request in the declaration was sufficient on the issue joined; that the defendant, by the terms of his covenant, was bound at all times from the 1st April, 1837, to 1st April, 1838, to have at his furnace the whole amount of the pig iron, not exceeding five hundred tons. And if the plaintiffs had at any time applied for the five hundred tons of pig iron at once, it would have been evidence that they needed it, and if it was not delivered, that

would have been a breach of that covenant. The court also charged the jury that it was not necessary for the plaintiffs to make out in evidence that they had not received the pig metal, but that proof that it had been demanded at Sevierville, and information had that there was no metal, would excuse a demand being made at the furnace, and amounts to a demand.

Plaintiffs obtained a verdict, and the defendant moved in arrest of judgment, which the court refused. The question raised by the motion in arrest of judgment is whether, where from the nature of the agreement a special demand is necessary, but not averred in the declaration, such omission will be aided by verdict and the formal *saepies requisites* be held sufficient? Of this we have no doubt, both upon reason and authority. It falls within the general rule applicable to such cases; it is the defective *statement* of a title, and not the statement of a *defective title;* and the omission is cured by verdict, upon the ground that a recovery would not have been suffered by the court, unless the omission had been supplied in proof, and the special request shown. There is no error, therefore, in the refusal of the court to arrest the judgment. But we are satisfied that the charge of the court to the jury is erroneous, the court having misapprehended the meaning and legal effect of the covenant. It seems obvious that the contracting parties, manufacturers of iron, the one owning a furnace of pig metal, and the other owning forges of bar iron, to be carried on through the year, could not, and did not intend that so much as five hundred tons should have been furnished at once; because in the nature of things the one could not at once supply, or the other at once need so large an amount.

The five hundred tons are the maximum of the aggregate amount to be distributively delivered at the furnace, in convenient quantities, throughout the year, as the same might, according to circumstances, be needed from time to time by the manufacturer of the bar iron. As Rodgers was not bound to deliver five hundred tons of pig iron during the year to the Loves, but only so much, not exceeding that amount, as they might need during the year at their manufactories, his obligation from time to time to supply was necessarily limited by

their wants, from time to time, to consume; and, therefore, from the nature of the thing, it was incumbent upon the Loves, from time to time, to notify Rodgers of the extent of their wants, and to demand, as needed, a convenient supply.

Entertaining these views of the meaning of the contract, and of the reciprocal duties of the parties to each other, it becomes necessary to reverse the judgment, and grant a new trial.

BUSHNELL V. CHURCH AND SCOVILLE.

(15 Connecticut, 406. Supreme Court, 1843.)

Guaranty on ore digging contract—Delivery—Notice. Plaintiff was digging ore for William Church, under a written contract to dig it as fast as it was wanted, when he refused to dig any more unless he was secured on the contract, whereupon the defendants indorsed a guaranty upon the contract. The contract was then handed to a third party to be delivered to plaintiff. *Held*,

1. That the delivery was perfect without notice to defendants, that plaintiff had accepted their guaranty.

2. That notice of refusal by the original contractor to pay was not necessary to be given to the guarantor before action.

3. That notice of the amount due was not necessary to be given to the guarantors.

Proof of insolvency. The insolvency of the original debtor being proved, a deed of indemnity from such debtor to his debtors is admissible to prove both the time of such insolvency and that the guarantors had received no damage from want of notice.

Guarantor bound by principal's acts. The directions given by the original contractor to his employes are admissible in evidence against, and binding upon the guarantors of the contract.

This was an action of assumpsit, founded on the following written instruments:

1. "This agreement made between William Church, of Canaan, and Albert Bushnell, of Salisbury, witnesseth:

The said William, on condition that the said Albert performs the agreement on his part hereafter set forth, agrees to pay him $1.75 per ton for all the iron ore the said Albert shall dig and raise from the ore bed in Salisbury, owned by Samuel and Leman Church, not exceeding 600 tons, and which the

said William shall be enabled to sell and take away by the 1st day of April next; said payment to be made on said 1st day of April, and the said Albert, in consideration of the agreement of said William aforesaid, promises to proceed immediately, and commence raising said ore from said bed, and to continue faithfully and diligently to raise said quantity of ore, if it can be found in said bed, by the use of all reasonable efforts, as fast as the said William shall wish to take the same away; said tons to be gross weight. And it is mutually agreed between both parties that if said ore should prove worthless, or for any other cause the said William should be unable to make sale of the same, the said Albert shall be under no obligation to continue raising the same, and the said William to be under no obligation to take, sell or dispose of it; but each party shall be at liberty to terminate this contract. And it is also agreed that the ore already raised from said bed, and which has been taken away, or which is now on hand, for which the said Albert has not been paid, is to be considered as part and parcel of said 600 tons.

And it is further agreed that if, for any of the causes aforesaid, the said William shall not sell or dispose of the whole of said quantity of ore within said time, that he shall on said 1st day of April pay the said Albert for so much thereof as he shall have sold or disposed of, said ore to be good merchantable ore to be selected and sorted in conformity to the customs and usage of the Salisbury ore hill, except as to the exclusion of the ore called "white horse," which is to be treated as iron ore, so long as it can be sold or disposed of, as aforesaid. Canaan, 5th May, 1859.

(Signed) ALBERT BUSHNELL.
WILLIAM CHURCH.

2. We agree to warrant the performance of the within and above contract, on the part of the said William.

Salisbury, 5th May, 1839.

(Signed) LEMAN CHURCH,
SAMUEL C. SCOVILLE."

The cause was tried at Litchfield, August term, 1842, before WILLIAMS, Ch. J.

The plaintiff claimed that he had down all that by his con-

tract he was bound to do, for which he had received no payment; and offered testimony to prove that after he began to dig the ore for William Church, the plaintiff informed him that he, the plaintiff, should not continue to labor, unless he, Church, procured the guaranty, which he had agreed to procure; and that soon afterward, Church procured Leman Church, one of the defendants, to draw the guaranty now in suit, and to sign it with Scoville, the other defendant, after which it was signed by William Church, and handed to a witness to deliver to the plaintiff. To this there was no opposing testimony.

The defendants claimed that the plaintiff must fail, because he had not given them notice that he accepted the guaranty; the court instructed the jury that this was not necessary. The plaintiff also offered evidence to prove that soon after he began to labor under this contract, William Church made sale of 600 tons of ore, the subject of such contract, and came to him and informed him thereof, and directed him to dig and sort the same for market, as soon as possible, as he had engaged teams to take it off as soon as it was so prepared.

To this evidence of the declarations of William Church the defendants objected. The court, however, admitted it accompanied with the directions given.

The plaintiff claimed that in pursuance of such information and directions, he immediately proceeded to dig and raise said ore, and prepare it for market, according to his engagement, and that nearly one half was taken away, in pursuance of said information. The defendants denied that in fact there ever was any such sale, and that William Church had given such information or directions, and claimed that if he had, it was through misapprehension of the terms of the arrangement. The defendants also claimed, that said ore was worthless, and not merchantable, but utterly unsalable, and so the plaintiff had no right to recover of William Church. At any rate he had no right to recover of them.

The court instructed the jury, that whether the ore was in itself merchantable or not, the plaintiff was not accountable therefor, if it was of the kind, and prepared for market in the manner specified in the contract; and that if William Church had sold the ore, as the plaintiff claimed, or if he had rep-

resented to the plaintiff that he had sold it, and given directions to go on and prepare it for market, as soon as possible, as the plaintiff claimed, and the plaintiff in pursuance thereof, had so done, according to his contract, William Church was responsible to him, whether the ore was valuable or not, or whether he was mistaken or not, as to the sale; that the plaintiff, acting under his directions, under this belief, must have a right to look to him for payment for his labor under the contract; and that the defendants, in the relation in which they stood to William Church, must be responsible for his failure to perform this contract, unless other objections prevailed.

The plaintiff also claimed to have proved that in the fall of 1839, William Church became insolvent; and to prove the time when he became so and for other purposes, the plaintiff offered in evidence a copy of a mortgage deed to the defendants and others, dated the 16th of October, 1839, by which, he claimed, it would appear that the defendants were indemnified for the guaranty in question.

The defendants objected to the admission of this deed, as immaterial and irrelevant; but the court admitted it.

The plaintiff also claimed to have proved, by one Norton, that on the 16th of May, 1840, he demanded payment of William Church upon the contract, in June of Leman Church, and in July of Scoville, each of whom neglected and refused to pay. The defendants claimed that the plaintiff was bound to give them notice that demand had been made of William Church, and that he had refused to pay; and that he should also have given them notice of the quantity of ore dug, and prepared for market, and actually sold. The court instructed the jury that if they believed the testimony of Norton, and that the security had been given to the defendants by William Church against this very claim, as the plaintiff contended, then notwithstanding this objection, they ought to find for the plaintiff, as no further notice was necessary. The plaintiff had a verdict, and the defendants moved for a new trial.

ELLSWORTH and CHURCH, in support of the motion, contended: 1. That the contract of guaranty in this case was of such a nature that it was incumbent on the plaintiff to give

notice of its acceptance by him before a right of action accrued to him. Here was a mere proposition. The plaintiff was under no obligation to accede to the terms and *non constat* that he ever did. This case is clearly governed by that of *Craft* v. *Isham*, 13 Conn. R. 28, and is clearly distinguishable from that of the *New Haven County Bank* v. *Mitchell*, 15 Conn. R. 206. In the latter case the parties were both present and the writing was simultaneously delivered and accepted. It would be absurd to require a formal notice of a fact of which the party to be notified had, and from the nature of the case must have had, actual knowledge at the time it took place.

2. That what William Church said to the plaintiff was not evidence against these defendants. As the plaintiff by the terms of the contract was to be paid for the digging of such ore only as William Church should make sale of, the fact of sale was indispensable to a recovery by the plaintiff against anybody. Could this be proved by the declarations of William Church? He is neither a party on the record nor a party in interest. If William Church had been acting as an agent, his declarations would not have been admissible against his principal; but here no such relation existed between him and the defendants. Nor are these declarations admissible as part of the *res gestæ*. What was the *res gestæ*? The sale of the ore. But that was a past transaction. This is a case of mere hearsay from one who was a competent witness.

3. That the charge of the court, making the defendants liable, not only for the ore which William Church sold, but for what he said he sold, was erroneous. The defendants are sureties; and, as such, are not liable beyond the letter of their contract; but the contract does not embrace the sayings of William Church.

The principal can not, by his declarations, impair any condition affecting the liability of the surety.

4. That the deed of indemnity to the defendants was improperly admitted, either to prove the fact of William Church's insolvency, or the time when it happened. These matters had no bearing on the liability of the defendants, and were manifestly introduced *ad cap*, with the jury. The defendants had no opportunity to show that their security was *moonshine*. The taking of security does not dispense with any

duty incumbent upon the holder of a guaranty, nor vary the liability of the guarantor: *Babcock et al.* v. *Bryant*, 12 Pick. 133.

5. That notice should have been given to the defendants of the quantity of ore dug, and that demand had been made of William Church, and that he refused to pay; and so the court should have instructed the jury.

The undertaking of the defendants is not an absolute, but a collateral and conditional one. It is, that they will pay for the ore dug by William Church, if he does not. The quantity of ore dug, the non-payment, are matters more properly in the knowledge of the plaintiff than of the defendants.

On *principle*, therefore he should have given notice of them; and so are the authorities.

T. SMITH and HUBBARD *contra*, contended, 1. That the guaranty of the defendants is an absolute undertaking that William Church shall perform his contract; and no such notice as is contended for, is required to be given. It is not the case of a mere offer to guaranty the contract of another; but is an absolute unconditional guaranty of the contract of William Church: *Williams* v. *Granger*, 4 Day. 444; *Breed* v. *Hillhouse*, 7 Conn. 223; *Hammond* v. *Gilmore's Adm'r*, 14 Conn. 479, 1 Sw. Dig. 698.

The contract and guaranty in legal were executed at the same time, for the same consideration, and are inseparable. The guaranty is annexed to the contract, and bears the same date; and it is unimportant whether in point of fact, Bushnell signed the contract before or after the defendants signed the guaranty; both take effect from the day of the date: 1 Sw. Dig. 178. The transaction is not subject to the rules which govern commercial guaranties: *Breed* v. *Killhouse*, 7 Conn. 28. The case is not like that of *Craft* v. *Isham*, 13 Conn. R. 28. That was a letter of credit in a mercantile transaction; a mere offer to guaranty the payment of part of the goods that should be delivered: 2 Stark. Ev. 648.

2. That the declarations of William Church made to the plaintiff, accompanied with the directions given to raise the ore were admissible. The declarations objected to, are the notice William Church gave the plaintiff that he had sold the

ore, and that he must raise it, etc. How was Bushnell to know whether the ore was sold or not? The sale of it was a fact that lay exclusively in the knowledge of William Church. It is clear, that by the terms of the contract, William Church was to give notice of sales, and was to give directions from time to time, as to the quantity to be dug, not exceeding 600 tons. Even the declarations of a principal as to the question of indebtedness, are admissible and binding on the surety: *Howard* v. *Cobb*, 3 Day. 309. The notice given by William Church was part of the *res gestæ:* Ph. Evid. 76; *Davies* v. *Kingsley*, 13 Conn. 285. Whether the ore was merchantable or not, the plaintiff is entitled to recover, if it was of the kind, and was raised, assorted and prepared for market, in the manner specified by the contract.

3. That if William Church notified the plaintiff, that he had sold the ore and gave directions to the plaintiff to go on and dig and prepare the same for market, as the case finds, it then became the duty of the plaintiff to raise the ore; and having done so according to the contract, he must have a right to recover for his labor of William Church; and the defendants, in the relation which they stand to him, must be responsible for his failure to perform this contract. The liability of the defendants is accessory to that of William Church; and they are bound for the same thing and to the same extent that he is: Theobald, 2, 43, 44, 45. William Church, by giving such notice, put it out of the power of Bushnell to terminate the contract. See 3d paragraph in the contract.

4. That William Church having become insolvent, evidence that the defendants were indemnified against this very claim, was material and relevant. This the deed at least conduced to prove. It was also relevant to show the time when William Church became insolvent, and to show that the defendants, as early as October, 1839, and long before the money was payable under said contract, had full notice that Bushnell had accepted their guaranty, and acted under it; and that they had incurred a liability under their guaranty; and to show that the defendants had full notice, soon after the ore was raised, of everything that had been done by Bushnell under the contract and guaranty.

5. That the quantity of ore sold lay as much in the cogni-

zance of the defendants as of the plaintiff. No one is bound to give notice to another of a fact of which that other may inform himself.

If an act is to be done to a third person, or by a third person, no notice need be given: Lawes on Pl. 221; 1 Chitt. Pl. 320; 1 Sw. Dig. 697. The defendants, by an inquiry of their principal, could have ascertained all the facts in regard to what had been done under their contract. It was their duty to see that their principal performed his contract: *Wright* v. *Simpson*, 6 Ves. Jr. 734; *Hammond* v. *Gilmore's Adm'r*, 14 Conn. 468. Nor was it necessary for the plaintiff to give notice to the defendants, that demand had been made on William Church, and that he had refused to pay. But the case shows, that demand *was* made, first of William Church, and then of the defendants.

But the fact that William Church, soon after the ore was raised by Bushnell, and before the money became payable, assigned his property to the defendants, gave them an indemnity on this very claim, and became insolvent, is a sufficient answer to all the questions of notice raised by the motion: *Bond* v. *Farnham*, 5 Mass. 170.

WILLIAMS, CH. J.—The defendants claim that they are not liable on this guaranty, because Bushnell did not give them notice of his acceptance thereof; and rely upon the case of *Craft* v. *Isham*, in support of this claim. If this contract falls within the principles of that case, it must be governed by it; for we have no reasons to be dissatisfied with the authority of that case. That was strictly a commercial guaranty, or a mere offer or proposal to guaranty, in which case notice must be given. We do not think this is a case of that character. Here, the plaintiff was actually at work for William Church, digging ore; he refused to proceed with his work, unless said William would procure the guaranty he had promised; and under these circumstances, William Church procured one of these defendants to put into writing his contract with the plaintiff, dated 9th of May, 1839; and the defendants execute upon the back of it a writing of guaranty of performance, of the same date, which writing was signed and handed to a witness to deliver to the plaintiff. We can not consider this as a mere offer to guaranty, founded upon a

future acceptance by the plaintiff. But the situation of the parties, the date of the contract, as well as its terms, all concur to show that it was intended as a contemporaneous act on the part of all concerned.

When it was drawn, Bushnell was laboring under contract with William Church. Upon that contract, he claimed he was to have a guaranty, and enforced this claim by threatening to withdraw from it. William Church then procures the contract to be put in writing, by the terms of which the existing agreement between the plaintiff and William Church is recognized; for it was agreed that security should be given as well for what had been done, as what was promised to be done by the plaintiff, in digging this ore. When this contract was signed and handed to the plaintiff, it must have been intended that it should be for security for his past, as well as for his future services; and the defendants certainly must have understood that this was in compliance with a previous contract. There was, indeed, no evidence when the plaintiff signed the contract, and we do not think such evidence was necessary. If he never signed, it could be of no importance; for his claim against Church was made to depend entirely upon performance on his part. But if his signature was important, the fact that the writings all bear one date is *prima facie* evidence that it was all one transaction, unless the contrary is proved; and no such proof is before us.

Instead, then, of being a prospective commercial guaranty, like that in *Craft* v. *Isham*, it much more resembles the case of the *New Haven County Bank* v. *Mitchell*, decided at the last term, where it was held, that the delivery of the instrument was not an incipient step in the formation of the contract, but the result of previous negotiation and agreement, and constituted the very consummation of the contract: 15 Conn. 219. The case of *Wilder* v. *Savage*, recently decided in Massachusetts, by the learned judge of the Supreme Court of the United States, also bears upon this, as well as other points in the case. There, Bruce wanted from Mr. Austin, a credit upon the plaintiff for 200*l*., which Austin agreed to give, if the goods procured should be consigned to the plaintiff. Bruce would also furnish a personal guaranty for 500*l*. The defendant gave this guaranty, and the letter of credit was

given upon which this suit was brought; and Judge STORY, fully admitting the law as to the necessity of notice upon a guaranty for future advances, held, that it was inapplicable to that case; for the agreement to accept was contemporaneous with the guaranty, and indeed constituted the consideration and basis thereof: 1 Story's R. 32. We think, therefore, that this objection can not prevail.

2. But it was claimed that the plaintiff had not proved a demand upon William Church and notice to the defendants that he had not preformed. It was claimed on behalf of the plaintiff that he had proved by one Norton that he made demand of payment of William Church in May, 1840, and soon after, of the defendants.

The defendants claimed that no notice was given them of the demand upon William Church, nor of the quantity of ore dug by the plaintiff, and prepared for market and sold. Upon this point the jury were instructed that, if they believed Norton's testimony, and that security was given to the defendants against this very claim, no further notice was necessary. This was done to give the plaintiff the advantage which he claimed from that testimony. The objections were, that they were not apprised of the extent of the plaintiff's demand, nor that William Church had been called upon.

As to the first, we know no rule which requires the plaintiff to present the defendants with the particular amount due. It was formerly held by the superior court that before one town could sue another for supplies for a pauper, they should exhibit a bill of these supplies in writing; but this court decided that this was not necessary—reasonable notice only should be given: *Newton* v. *Danbury*, 3 Conn. 559. If, therefore, any notice was necessary, it can not be claimed that the amount need to be shown, unless the defendants admitted a liability to pay as guarantors. But it is claimed that the defendants should have been informed that Church had not paid, and that demand had been made on him for payment; in other words, that the same strictness of notice, except as to time, is required in such a case as upon a bill of exchange. The defendants became guarantors, not only of the solvency of William Church, but that he should perform his contract. The demand upon them to pay imported a notice that he had

not performed his contract, and was a reasonable notice. But no notice was necessary. It was their duty as sureties to see that the principals performed. This subject has been so recently discussed in the case of *Hammond* v. *Gilmore's Adm'r*, 14 Conn. 479, as not to call for further remark. There Olmsted contracted to deliver to Hall and others certain trees growing on his land next fall; Hall to pay twenty cents for each tree; and if either party failed, to pay $3,000. Gilmore guarantied the payment by Hall. There was no evidence that Olmsted ever gave Gilmore or his administrator notice of Hall's failure to perform his contract, or that he had performed his; and this court held, that it was not necessary; that Gilmore was privy to the contract made by Hall and was bound to ascertain for himself whether a forfeiture against which he had stipulated had been incurred: 14 Conn. 486. We are not able to distinguish the case before us upon this point from that. If, however, notice was necessary, the rule in the case of negotiable paper as to demand and notice has been but a feeble and qualified application to a guaranty. In the former case, says Judge KENT, the want of demand and notice will prevent a recovery, unless the plaintiff can show some legal excuse; but in the case of a guaranty the rule is, that the want of notice must have produced some loss or injury to the guarantor: 3 Kent's C. 123. So it has been held in a variety of cases in Great Britain and our sister States: *Warrington* v. *Furbor*, 8 East, 242; *Swinyard* v. *Bowes*, 5 Man. & Sel. 62; *Oxford Bank* v. *Haynes*, 8 Pick. 423; *Gibbs* v. *Cannon*, 9 Serg. & R. 202; *Van Wort* v. *Wooley et al.*, 3 B. & Cres. 439 (10 E. C. L. 204). The recent decisions in the courts of the United States make it unnecessary to cite other authorities.

The rule is well settled that the guarantor, even of a promissory note, whose name does not appear on the note, is bound without notice, where the maker was insolvent at its maturity.

There must not only be a want of notice but there must be some loss or prejudice sustained thereby: *Reynolds* v. *Douglas*, 12 Pet. 497; *Wildes* v. *Savage*, 1 Sto. 22; and it would seem from these authorities, that the defendant, before he can insist upon this want of notice, must prove it has been some

prejudice to him; for in *Reynolds* v. *Douglas*, the court say his liability continues, unless he can show he has sustained some prejudice by want of notice of a demand on the maker, and non-payment; and in the last case Judge STORY says, "It is not shown, nor as far as I know is it pretended in argument, that notice punctually would have been of any advantage to the defendant, or that he has sustained any damage thereby." On this point, therefore, the defendants can not object to the charge. In connection with this point, we notice an objection which was taken to the copy of a deed of William Church to the defendants, to prove the time of his insolvency, which was objected to and admitted. The proof of William Church's insolvency had been admitted without objection. The plaintiff wanted to prove *when* he became so; and the defendants objected to the admission of this deed as immaterial and irrelevant, tending to prove no fact of importance in the case. The plaintiff claimed that insolvency being proved, the *time* of such insolvency might also be proved; and that there having been no objection to the proof of insolvency, they ought not to object to the proof as to the time of insolvency; and further, that the fact that William Church, being insolvent before the time of the performance of this contract, and conveying his property to indemnify the defendants against it, they could not complain of the want of notice.

After having denied that the principal was insolvent when this contract came to maturity, it certainly became proper, if not necessary, for the plaintiff, when the defendants claimed they had no notice, to show they had not suffered damage from the want of it, or that the damage was trifling. And the insolvency of William Church, together with the fact that he had conveyed to them property to secure them against this very claim, was all-important to the plaintiff, if the notice was not sufficient; and the time of the insolvency was important, to show that it happened before the time when the plaintiff's claim arose. We can, therefore, see no valid objection to this evidence.

The plaintiff also offered testimony to show that soon after he began to labor under this guaranty, William Church made sale of 600 tons of the ore, and came to him and informed him of this fact, and directed him to dig and sort the

same for market, as soon as possible. The defendants objected to the declarations of William Church, claiming that they did not prove the fact of a sale—at all events, not as against them; that the evidence was merely hearsay; and William Church ought to be called as a witness. The court, however, admitted the testimony. That this would have been proper evidence against William Church, if the suit had been against him, there can be no doubt; and if the defendants had signed the obligation with him, as surety, instead of warranting his performance, it would have been proper as against both. It is said, however, that as William Church is neither party nor witness, his declarations are not evidence against these defendants; and it is insisted, that they warranted he should pay for the ore he had sold, not that which he *said* he had sold. To determine the weight to be given to this argument, we must look at the relative situation of these parties. William Church hires Bushnell to dig ore as fast as he wants it and can sell it; and is to pay him only on condition that Bushnell complies with his contract; and the defendants guaranty that William Church shall perform; in other words, they will pay, if he should be bound to pay, and does not. William Church, then, is the man whom all the parties agree to look to, as the person to receive and sell the ore, and to direct how fast it shall be got out.

Bushnell, to comply with this contract, must get it out as fast as William Church sells it, or he can have no claim. How is he to know how fast William Church wants it got out, otherwise than by the orders or directions of William Church? Supposing William Church directs him to hasten the work, for he has sold the ore; would it be a sufficient reason for Bushnell's delaying the work, that he had no proof that Church had actually sold the ore? As between these men, must it not be sufficient evidence of the fact of sale, that he for whose benefit this clause in the contract was introduced, directed the man he had employed to go on for he had made the sale? Would not Church be forever estopped from denying it? Would he be admitted to say, that the plaintiff went on confiding in his word, but he deceived him or was himself deceived or mistaken? Who ought, in justice, to bear the consequence of such a mistake? There can be but one opinion.

Bushnell is laboring under William Church's directions, and to receive payment only in case he follows them, with a right, however, if in his opinion his interests require it, to stop after notice given. Lulled into security by the information of William Church that he has sold the whole quantity, he refrains from giving notice, raises the whole quantity, and when he calls for his pay, is told that William Church was mistaken—that he thought he made the sale, but it has turned out otherwise. The man denies it, and he has no evidence of it. Who shall bear this loss? The man who, by his direction, has been induced to do the work, or the man who directed him to do it, under the affirmation that the sale was made? William Church must be estopped, as much from averring he had made a mistake, as from averring he had told a falsehood; for the mistake, though not as criminal, is precisely as injurious to him who was the subject of it.

An estoppel, by an act *in pais*, is as complete as by a deed. An acceptance of a lease, by a man, or an acknowledgment that a certain woman is his wife, will bind the one accepting the lease as tenant, or the other as husband: 2 Esp. Ca. 637; 3 Conn. 47. So if a person represents himself as owner, it is immaterial whether he was so or not; having so represented himself, he is responsible to that extent: *Helme* v. *Smith*, 7 Bing. 709 (20 E. C. L. 316). So if one stands by and sees his land sold at auction, and encourages another to bid, he shall be estopped from controverting the validity of the sale: *Helme* v. *Smith*, *ut supra*. 7 S. & R. 467. So where one gave to another a bill of parcels of certain goods, with a certificate that he held them on storage, he was estopped to say he never had such goods: *Chapman* v. *Searle*, 3 Pick. 38; *Bonaffe* v. *Woodberry*, 12 Pick. 456. So if a medical man passes himself off as a physician in England, he can maintain no action for his fees, for, says Lord ELLENBOROUGH, he must take the character *cum onere: Lipscombe* v. *Holmes*, 2 Camp. 441. So where property being libeled in the Admiralty Court, the plaintiffs procured their clerk to claim it as his own, and then brought a suit for the proceeds: it was held, the plaintiffs were estopped, by their own act, in setting up and establishing the defendants' claim in a Court of Admiralty, from now turning round and insisting that it

was their own: *Demetton* v. *Demello*, 12 East, 234; S. C. at Nisi Prius, 2 Camp. 420.

It is said, that though these declarations are admissible against William Church, yet they are not admissible against the defendants. As confessions of William Church, they may not be admissible, and on the trial, the confessions were ruled out; but his declarations accompanying his directions to get out the ore, were received as part of the *res gestæ*. The declarations of an agent, acting in the course of his business, are constantly admitted against his principal. Thus, when a bailiff had, on his warrant, acknowledged he had received the money, and directed a discharge in a suit against the sheriff, this was held to be good evidence, though it was claimed the bailiff should be called: *Perchard et al.* v. *Tindall*, 1 Esp. Ca. 394. So the declaration of a clerk in a banking house as to alterations made in the plaintiff's pass-book, was evidence against the principal: *Price* v. *Marsh*, 1 Car. & P. 60 (12 E. C. L. R. 45). So where the president of a bank called upon the defendant to pay a note, which the defendant claimed was paid, and upon examining the books, the president declared himself satisfied that this claim was correct; it was held in an action upon the note, that the declaration of the president was proper evidence, being part of the *res gestæ*. It was an admission made in the business of his agency, in respect to the very matters committed to his charge: *Bank of Monroe* v. *Field et al.*, 2 Hill. 445. The power of William Church, in this case, was surely as great in relation to the subject of this ore, as the president's was as to that note; both were acting upon their proper business, and within the scope of their authority. In *Newell* v. *Roberts*, which has been cited by the defendants, the principle was recognized that the acts or declarations of an agent, in the course of his agency, were admissible, constituting part of the *res gestæ;* but it was held that Newell was not the agent of the defendants, much less of the creditors who signed the receipts: 13 Conn. 72. In the case of a surety in a probate bond, a judgment against the principal was held conclusive evidence against the surety, unless fraud could be shown in obtaining it; though it was urged that it might have been obtained upon the confession of the principal: *Willey* v. *Paulk*, 6 Conn. 74. And in *Drummond*

v. *Prestman*, 12 Wheat. 516, where such a judgment was given in evidence, and also an account stated by the principal, while alive, it was held that that account might be given in evidence against the guarantor. The judge says, the guaranty purports to be something more than the mere suretyship for debt. The words are, "I guaranty to you the conduct of my son." It partakes, therefore, of the nature of a bond for the faithful discharge of a duty; and it can not be doubted, that in proving the fact of the breach of the condition of such a bond, the confessions of the principal, after his death would be evidence. In that case, the principal being dead, it was not necessary to go further, though it is intimated that the case of *Perchard* v. *Tindall* would go far to show that the same rule would operate, had the principal been alive. That certainly would be of no importance, unless it was the duty of the plaintiff to call him as a witness to prove an actual sale, instead of proving his declarations of a sale accompanying his directions to go on with the work. Having shown that the latter was sufficient to authorize the plaintiff to proceed in the work, the former proof would become unnecessary; and the testimony of William Church to his acts or declarations is no higher species of proof than that of any other witness to such acts or declarations; of course the plaintiff could be under no obligation to call him. And in the case of *Deming* v. *Carrington*, 12 Conn. 1, it was decided, by this court, that where the defendants claimed title to land under Cowles, the plaintiff might prove the acts and declaration of Cowles while owner and in possession, though Cowles was alive and might have been called.

It was said, further, that if this testimony was admissible against these defendants, it might be rebutted; in other words, that the defendants might show that there was no sale of the ore. No evidence of that kind was offered by the defendants, and ruled out by the court; but the jury were told that if William Church represented to the plaintiff that he had sold the ore, and directed him to get it out as soon as possible, and the plaintiff had done the same, the plaintiff having in pursuance of these orders done the work, would have a right to look to William Church for pay for his labor, whether Church had in fact sold or not; and that the defendants, hav-

ing promised that William Church should perform his contract, must be responsible for his non-performance; and this, perhaps, warrants the construction given by the defendants to that part of the charge. We think the charge, on this point, was correct. The defendants, having warranted performance on the part of William Church, must be considered privy with him, so that if he has not complied with his engagement, they must be equally responsible with him. And although there may be cases where a party who has asserted a claim, may show he was mistaken, or where another's interest can not be affected; yet we understand the rule to be, that where the representations are such that another party may be presumed to have acted upon them, or upon the faith of them, and the party himself has gained some advantage, such representations are conclusive: See note (b) to *Bacon* v. *Chesney*, 1 Stark. Ca. 194. In conformity to this idea, BAILEY, J., in *Shaw* v. *Picton*, says: "If an agent, employed to receive money and communicate to his principal, renders an account from time to time, which contains a statement that the money has been received, he is bound by that account, unless he can show that that statement was made unintentionally and by mistake." "When an agent has deliberately and intentionally communicated to a principal, that the money due to him has been received, he makes the communication at his peril, and is not at liberty afterward to recover the money back again": 4 B. & Cres. 715 (10 E. C. L. 443, 450). William Church made this communication to the plaintiff, and upon the strength of it, the plaintiff waived his privilege of terminating the contract, and went on with his labor. It would, therefore, be most flagrant injustice, to say that the plaintiff should sustain the loss of his labor performed in good faith, in pursuance of his undertaking, and under the direction of William Church, the man with whom he contracted, whether that loss arose from a fraud or from the mistake of said Church. We know of no principle of law, any more than of justice, which requires such a construction. The court, therefore, are satisfied that no new trial ought to be granted.

In this opinion the other judges concurred, except CHURCH, J., who gave no opinion, being related to one of the parties.

New trial not to be granted.

CARNE ET AL. V. MITCHELL ET AL.

(15 L. J. Ch. 287. Before the Vice Chancellor, 1846.)

Party making contract without power to fulfill, subsequently obtaining power. This bill was filed for the purpose of enforcing a contract for a lease of mines, at a rent of one fifteenth of the minerals obtained. The defendant had subsequently granted a lease to another party at the same rent. The bill charged that, under an act of parliament, it was directed that the best rent should be obtained by the owner of the mines, and although one fifteenth was a fair rent when the plaintiff's contract was entered into, that afterward, the mines having become more valuable, that amount was not then a fair rent, and the lease granted by defendant was therefore contrary to the act. ***Held***, upon a demurrer for want of equity, that a party coming for performance of a contract could only have it as it actually exis.ed, and that as the rent reserved in the plaintiff's contract was not the best that could be obtained, it was contrary to the act, and in effect fraudulent. The plaintiff, therefore, could not have his contract enforced, and the demurrer was allowed. ***Held, also***, that it was an undeniable proposition, that when a party entered into a contract without having the power of performing it, and afterward acquired the right to do so, he was then bound to perform it.

This bill was filed by Wm. Carne and three other persons, suing on behalf of themselves and all others, the adventurers or shareholders in the North Wheal Rose Mining Company, in Cornwall, against the defendant Mitchell and others, who acted on behalf of all the shareholders in the East Wheal Rose Mining Company. It was stated that John Oxnam, by his will, dated the 7th of June, 1810, gave to his wife, since deceased, all his freehold estate called Warrens, during her life, and afterward he gave the same to John Oxnam, a defendant, for his life, and after his decease, to his first and other sons, as tenants in tail. That in the year 1829, John Oxnam, the defendant, granted a lease of the property, by way of mortgage, to Hugh Jane, for ninety-nine years, if the said John Oxnam should so long live, upon trust for securing the sum of £250 to Hugh Jane. This term was afterward assigned and transferred to Thomas Nicholas, with a power of sale, in case the sum of £250 should not be paid. Default having subsequently been made in the payment of this sum, the property was sold to John Huddy by public auction, and at the time of the auction it was stated by the auctioneer, and by

Thomas Nicholas in the presence of the defendant, John Oxnam, that the purchaser of the hereditaments would be entitled to all the minerals under the same. It was then stated that the mines worked by the North Wheal Rose adventurers were situated in land adjoining the aforesaid hereditaments, and it became desirable for them to get a sett or lease of the minerals under a field called the "wood ground." The company, therefore, applied to John Oxnam and John Huddy to grant them such lease, and after some discussion as to who had the power of granting the lease, John Huddy entered into an agreement on the 14th of December, 1839, with the North Wheal Rose Company, authorizing them to dig and search for minerals in the field called "wood ground," and to carry off the said minerals belonging to him, and to grant a deed for the sett, at the rate of one fifteenth of the minerals, which consisted of lead and tin, with the full knowledge and approbation of John Huddy and John Oxnam.

It was then stated, that the mines having become very valuable, another company in the neighborhood called the "East Wheal Rose Company," made endeavors to obtain a lease of such mines for their own benefit, and applied to John Huddy and J. Oxnam, when a plan was adopted under which Huddy, for £499 assigned to the defendant Mitchell, the said appurtenances, for the residue of the term of ninety-nine years, determinable as aforesaid, in trust for the East Wheal Rose Company, and afterward an act of parliament was obtained, dated the 1st of August, 1843, empowering the person entitled to the possession of the lands, to grant a lease for twenty-one years of the minerals, and a lease was consequently made, to the East Wheal Rose Company, under which they had entered and continued to work the mines. It was then charged, that this lease was fraudulently obtained, contrary to the rights of the plaintiffs; that under the act of parliament it was directed that the best rent should be obtained from the mines, and that although one fifteenth part of the mineral raised was a fair rent before the works had been commenced, that now as the mines had turned out to be so very beneficial, one fifteenth was not a fair rent, and was, therefore, contrary to the act of parliament. The bill prayed that the

lease granted to the East Wheal Rose Company, might be delivered up to be canceled, and that the agreement entered into on the 14th of December, 1839, by Huddy and Oxnam, to allow the plaintiffs to take the minerals, might be enforced, and a lease made in pursuance thereof, under the powers given by the act of parliament. A general demurrer for want of equity was put in to this bill.

STUART and PRIOR, for the demurrer.

BETHELL and FOLLETT, for the bill.

The VICE CHANCELLOR said that, having regard to the charge in the bill, that the rent of one fifteenth of the minerals raised was less than the value which ought to be obtained, and that, in consequence thereof, the lease was void under the act of parliament, he should allow the demurrer. It appeared to his Honor, that the effect of the memorandum of agreement of December, 1839, was, that Huddy undertook to grant a lease of all the mines belonging to him, under the wood ground field. He authorized them to dig and search for minerals, and to carry off the minerals belonging to him, and to grant a deed for the sett at the rate of one fifteenth of the minerals raised; so that, in fact, he agreed to grant a lease at that rent, and a party coming to the court for the performance of a contract, could only have it as it actually existed, and by that must stand or fall. As to the question of equity, he was of opinion, that it was an undeniable proposition, that when a party entered into a contract without having the power of performing that contract, and afterward acquired the right which he contracted to dispose of, he was then bound to perform it. The bill stated distinctly, that the act of parliament authorized a lease to be granted at the best rent which could be obtained, and that although one fifteenth was the best rent formerly, it was not a fair rent now, and was, therefore, contrary to the act, and, in effect, fraudulent. He did not see what power he now had to order the lease to be canceled; and he should, therefore, allow the demurrer.

JOWETT v. SPENCER.[1]

(1 Ex. 647. Court of Exchequer Chamber, 1847.)

Sale of coal "found." Plaintiff by indenture granted to defendant all the coals under certain land at £40 for every acre of coal which should be *found* within or under the premises, such consideration to be paid at the rate of £20 each half year. *Held*, that the finding of coal was not a condition precedent to recovery; that the word found meant "ascertained to lie and be"; that the plaintiff had parted with his title and possession of the coal, and it was for the defendant to show that coal did not underlie the land in order to defeat recovery.

In this case, the Court of Exchequer having arrested the judgment, a writ of error was brought, and argued in this court on the 18th of June, 1847, by HUGH HILL (ADDISON with him), for the plaintiff. The meaning of the covenant must be determined by the intention of the parties apparent upon the face of the instrument: *Stavers* v. *Curling*, 3 Bing. N. C. 355 (E. C. L. R. Vol. 32). Adopting that rule of construction, it is no condition precedent that coal should be *found*. This is not a mere license to get coal, but a grant of all the coals, mines, etc., under a certain messuage and lands, in consideration of the payment of £40, at the periods mentioned. It is evident that the time of payment was one thing contemplated by the parties as the consideration for the grant, since the plaintiff has parted with his whole interest in the mines; and as the deed contains no stipulation requiring the defendant to work them within a particular period, he might either abstain altogether or for an indefinite number of years, or work slowly or quickly, at his discretion. The former part of the covenant limits the amount of the consideration; the latter specifies the mode and times of payment. In any other view no effect can be given to both parts of the covenant, and the words, "until the said price or consideration *money* should be paid," must be altogether rejected. *Aspdin* v. *Austin*, 5 Q. B. 671, shows that there is no implied covenant on the part of the defendant to work the mines within a reasonable time; and it could never have been the intention of the parties that the defendant should have it in his

[1] Same case, 15 M. & W. 662, Reversed.

power to say: "I will not work the mines, and therefore will not pay."

The case may be illustrated by the rule laid down with reference to covenants for the payment of money, or performance of any other act, on a day which may or may not happen before the thing which is the consideration for the payment of the money, or the other act, is to be performed; in which case *performance* is not a condition precedent: 1 Wms. Saund. 320, b. n.; *Hall* v. *Bainbridge*, 5 Q. B. 233. The words, "coal which should be found," must be controlled by the intention of the parties; the one parting with his whole interest in consideration of the other undertaking to pay an annual sum, without reference to the fact of whether the coal was or was not *gotten*. (He then argued, that at all events, the allegations in the declaration were sufficient to entitle the plaintiffs to recover, and cited 1 Wms. Saund. 228, d. n. (m); *Lord Huntingtower* v. *Gardiner*, 1 B. & C. 297, E. C. L. R. Vol. 8; *Fletcher* v. *Pogson*, 3 B. & C. 192; *Hobson* v. *Middleton*, 6 B. & C. 295, and *Boydell* v. *Harkness*, 4 Dowl. & L. 178, as authorities to show, that, if any ambiguity exists, the court will, after verdict, give such a construction as will support the pleadings.)

ATHERTON, *contra*.—The former branch of the covenant imposes the obligation of paying a certain price for every acre of coal found; the latter branch defines the mode and times in which that price is to be paid. The quantity found would of necessity be uncertain, therefore the parties stipulate that the consideration shall be paid in a particular way. The words, "until the said price or consideration money should be paid," merely prescribe the limit of payment. There is a clear distinction between the words, "found" and "existing"; if synonymous, the averment in the declaration should have followed the words of the covenant. As the declaration is framed, the defendant has no opportunity of putting in issue the fact whether coal has or has not been found. (He then argued that it was consistent with every allegation in the declaration that all the coal found had been paid for, citing *Stennel* v. *Hogg*, 1 Wms. Saund. 228 a, and *Sicklemore* v. *Thistleton*, 6 M. & Sel. 9. ***Cur. adv. vult.***

HUGH HILL replied.

The judgment of the court was afterward delivered by LORD DENMAN, C. J.—This is an action of covenant on an indenture, whereby the plaintiff conveys to the defendant and his heirs all the coal *lying and being within and under* certain premises; and the defendant covenants to pay 40*l.* for every statute acre of coal which should be *found within or under* the premises, and until the said price or consideration for the said coal should be fully paid, to pay 40*l.* per annum, by half yearly payments, on the 2d of January and the 2d of July, commencing from the date of the indenture (viz., 2d of July, 1844), whether the whole of an acre of the said coal should in any such year *be gotten or not.* The declaration avers that at the time of the making of the indenture, there was within and under the premises a large quantity of coal, and that a large quantity still remained; but it does not aver that any coals were found or *gotten.* The question is whether the *finding* of coal is a condition precedent to the plaintiffs recovering the annual sum of 40*l.*

It appears to us that it is not.

The parties seemed to have assumed that there were coals within and under the premises, and the indenture operates as an absolute sale and conveyance of that coal to the defendant, but without any covenant on his part to work or get that coal. The words of the conveying part are, "all the coals lying and being within and under the premises." Whether the defendant at any time should think fit to find and get them was left entirely to his will and pleasure. The consideration money is 40*l.* per acre for coals *found*, not for coals *gotten.* By the word "found" we apprehend the parties to mean, "ascertained to lie and be." It is necessary that the quantity should be ascertained at some time, in order to fix the ultimate amount of the consideration money. That quantity might be found and ascertained without working or getting the coal. Who, then, is the proper person to find and ascertain the quantity? Not the plaintiff, for he had parted with all his interest in and possession of the coal, but the defendant who has taken them. In order to secure his so finding and ascertaining the quantity, the covenant of the defendant to pay 40*l.* per annum till the consideration money should be fully paid is inserted;

otherwise, as there is no covenant to work or get the coal, the quantity might never be ascertained.

The right of the plaintiff to sue for the annual sum is absolute and without condition, and if by finding and ascertaining the quantity of the coal, and paying the annual sum stipulated, the defendant has fully paid the consideration money for the purchase of the coal, it is for him to plead those facts. We think, then, that the plaintiff is entitled to keep his verdict, and the judgment of the court below should be reversed.

Judgment reversed.

CAMPBELL v. GATES.

(10 Pa. St. 483. Supreme Court, 1849.)

Cleaning ore—Tools. A agreed to dig a certain quantity of iron ore annually, to clean it properly of all clay, sand, stone, etc., and deliver it to B, who agreed to furnish all screens, ropes, and other implements necessary to work the banks. *Held*, that A was only bound so far to cleanse the ore as could be done with the implements furnished by B by using the same degree of skill and diligence as are ordinarily employed by persons in that business. *Held, also*, that such contract is indivisible.

Determination. After A had performed his contract in part, B wrote him a letter alleging that the ore was not properly cleaned, and refusing to receive any more ore unless A would allow B to make the ore good by "docking" what had been, and what would be received. A then tendered ore, but B refused, unless the docking was agreed to. The contract was thereby terminated as to A at his election, and he may sue for the refusal to perform.

In error from the Common Pleas of Centre.

By a written contract, the plaintiff agreed to raise, out of his own land, 600 or 1,000 tons of iron ore annually, until five years from the following 1st of April, "to clean it properly of all clay, sand, stone, etc.," and deliver it for the use of the defendants' furnace. The defendants agreed to pay 25 cents a ton on all ore raised for their use (as ore leave), $1 a ton for all ore raised, and $2 per ton for hauling. They further agreed to provide all tools, screens, ropes, and other implements necessary to work the bank or banks, and also keep them in repair.

The present action was assumpsit, to recover damages for a breach of this agreement, by reason of the defendants' refusal to receive the ore tendered, and also to recover the value of the ore delivered and received. These were included in one count.

On the trial it was shown that plaintiff had delivered ore to the defendants, under the contract, until August 18, 1846. On that day, defendants wrote to plaintiff the following letter:

"I do not wish to be thought captious in anything I do in relation to my business. When I contracted with you for your ore, you were delivering at the furnace good rock ore, that was worth the price I agreed to pay you, and the ore we were to get was to be as good and productive ore as that was. All the ore we have received, since the 1st of April last, is of an inferior sort, mostly screening of a very poor quality; at least the one fourth of it is clay and soap-stone; there is scarcely one piece of the whole that is not mixed, more or less, with this yellow ocherish-stone, like soap-stone, which renders it very unproductive; so much so, that it takes from three to four tons of your ore to make a ton of pig metal. We have frequently screened loads of your ore, and never found one of them that there was less than four and six large barrows full of dirt in, besides the soap-stone, which was not taken out and separated from the ore. I consider that you have violated our agreement by not cleaning the ore from clay and other foreign matter, which you promised in the agreement to do; and I hereby notify you, that hereafter I will not receive any more of your ore on any other terms than such as I conceive fair and just, and which I know of no other way of arriving at than to dock it to make it good. There is at least a half ton weight in every load of your ore, that is not ore, nor anything like ore, besides a great deal of matter that is nothing more than a miserable mixture of ore and other matter. I can abide by the contract in no other way than by making your ore good by taking off all other matter from it in the process of docking, which I will endeavor to do as nearly right as possible; and if you think that you can stand the process of dockage of the ore you have hauled since the 1st of April, as well as that which you may haul here-

after, you may continue to haul; but I am determined to pay hereafter for nothing but the pure iron ore, either hauling, raising, or leave, and wish you to govern yourself accordingly, and if you can not comply with your contract, and clean your ore from sand, clay, flint, stone, and other foreign matter, as you have engaged to do, then I want none of it, only for what it is worth, of which I myself am the best judge."

After this letter was received the plaintiff hauled one load of ore to the furnace, but the agent refused to permit him to deliver it. A witness for the plaintiff said that the agent assigned no other reason for his conduct than the instructions of the defendants; the agent himself, testified that he had instructions from the defendants not to weigh any more ore for plaintiff unless he agreed to clean it, according to his contract; that he told him so when the ore was tendered and refused. He further said, that one of the defendants gave him "the instructions on the 18th of August. He showed me the letter."

WOODWARD, P. J., instructed the jury, that contracts are to receive such reasonable construction as will accomplish the intention of the parties, and the whole is to be read together; "that, as the defendants were bound to furnish such 'tools, screens, ropes and other implements' as should be necessary to work the bank with; so that in promising properly to clean the ore of all clay, sand, stone, etc., the plaintiff promised to make diligent and skillful use of the 'tools, screens, ropes and other implements' which should be furnished him by the defendants; and was bound to use the same degree of diligence and skill which men engaged in similar business ordinarily employ. To clean the ore 'properly' was to clean it as completely as usual diligence and skill, employing such implements as defendants had furnished, could do; the ore might, or might not, be absolutely clean of clay, sand, stone and other impurities. If the defendants furnished implements which, with diligent and skillful use, would enable the plaintiff to extract from the bank what Mr. Campbell's letter called for—'the pure iron ore'—the plaintiff was bound by the tenor of his contract to furnish it; but if they did not, they had no right to exact from the plaintiff the pure iron ore. It is said that iron ore is never expected to go to the furnace ab-

solutely pure, and it is not probable that these parties contemplated any departure from the customary practice. *Properly* cleansed, may mean fitted for making iron—reduced to the pure ore—or it may mean, cleaned as iron ore is usually cleaned before it is hauled to the furnace; but in this contract this expression must be interpreted with reference to the facilities which the defendants bound themselves to furnish, and implies that degree of cleansing which reasonable skill and diligence, combined with these facilities, were capable of producing. Now, the question is for the jury, whether the plaintiff used such skill and diligence. If all the evidence satisfies them that he did; that he prepared the ore as well as he reasonably could with such means as were furnished him, we must, for the purposes of this action, consider the ore 'properly cleaned of all clay, sand, stone, etc.,' and hold the plaintiff to have performed his agreement in the particular in which alone failure has been imputed to him by the defendants.

"If the jury should be with the plaintiff in this point, the next question is, does defendants' letter of the 18th amount to an interruption and rescission on his part of the contract? The conduct of the clerk in refusing to weigh the last load of the ore, was in pursuance of one of the defendants' instructions, and this letter having been read to the clerk, and then sent to the plaintiff, we are to presume that the communications on which they intended the plaintiff to act, are contained in the letter, rather than in the conversation which Gifford had with him. The letter, like the contract, is for the court to construe, and, taking it as a whole, without laying undue emphasis on any particular expression or sentence, we have no hesitation in pronouncing it a refusal further to execute the contract of 1st November, 1845,—a repudiation of that agreement—and a proposition to substitute for it new and inconsistent conditions. The contract specifies the terms on which defendants were to receive and pay for the plaintiff's ore; the letter informs him that 'hereafter I will not receive any more of your ore on any other terms than such as I conceive fair and just'; the contract gives the defendants no right of dockage; the letter tells the plaintiff plainly, that they have assumed this right, and 'if you think that you can stand the process of dockage of the ore you have

hauled since the 1st of April, as well as that which you may haul hereafter, you may continue to haul.' The contract contemplated the delivery of ore properly cleaned, which, as we have already seen might or might not, be absolutely clean ore; the letter demands nothing but the pure iron ore.

"Now, when it is considered that Gates had received no intimation that his ore was not according to the contract, and when the letter was followed by an authorized refusal to weigh the only load he carried to the furnace after the receipt of the letter, we hold that he was right in regarding a letter couched in such terms as an interruption of the contract, and a refusal on the part of the defendants to go on with its performance. He did so regard it. He carried no more ore, but instituted this action for damages."

His Honor further said, that the declaration seemed to be comprehensive enough to embrace the facts of the case, and sustain a verdict for damages, and that the plaintiff might recover for the value of his contract for the whole time it had to run. The errors assigned were: In charging that the *narr.* was comprehensive enough, etc. 2. In the construction of the contract as to the manner the ore was to be cleaned. 3. In saying that the jury were to presume that the conversation between the agent and plaintiff referred rather to the letter of the defendants than to the conversation. 4. In saying that the letter of August 18th was an interruption of the contract, etc. 5. And in saying that damages might be recovered for the whole time the contract had to run.

CURTIN & HALE, for plaintiffs in error.

MCALLISTER & BURNSIDE, *contra.*

COULTER, J.—There is a lucid charge in this cause from the court below, to the jury, covering all the questions of law discussed here; and as the reasons therein set forth are in accordance with the views which this court entertain on the subjects discussed, the judgment is affirmed, for the reasons stated by the learned judge.

Judgment affirmed.

GROVE ET AL. v. DONALDSON.

(15 Pa. St. 128. Supreme Court, 1850.)

Fault in mine—Hardship. Where it was agreed that defendants would deliver a certain quantity of iron ore, which was to be the ore mined by E. B. on the lands of either Montgomery or Frick, and the plaintiff afterward refused to receive any more ore from the Montgomery mine, and it appeared that there was sufficient ore in the Montgomery mine to fulfill the contract, but that a fault existed in the Frick mine which rendered it expensive to work, the defendants were thereby excused from delivering any more ore.

It was not error under such a state of facts for the court to instruct the jury that it would be a hard case to subject the defendant to heavy damages.

Abandonment. A contract may be abandoned otherwise than by words; the conduct of the parties, and their situations to each other, may be considered by the jury in determining whether, by mutual consent, the contract was treated as ended; and that the matter has been suffered to rest for three years is evidence to the jury as to a presumed abandonment.

Refusal to agent to receive ore. A refusal to receive ore, made to E. B., who was named in the agreement as the person who was mining the ore which was the subject of the agreement, and who was employed by defendants in the work, is a refusal to his principals; and notice to them of the refusal would be unnecessary.

Error to the Common Pleas of Columbia County.

This was an action of assumpsit, by J. P. & J. Grove, partners, against William Donaldson and John McQuhae (the latter of whom died after the commencement of the action), to recover liquidated damages at the rate of $2 per ton for not delivering 753 tons of ore. The pleas were *non-assumpsit*, payment with leave, and set-off. The agreement was as follows:

Articles of an agreement made and concluded this thirtieth day of July, one thousand eight hundred and forty-five, between Donaldson & McQuhae, merchants of Danville, of the first part, and J. P. & J. Grove, iron masters, of the same place, of the second part—Witnesseth, that the said Donaldson & McQuhae, the party of the first part, agree to sell and deliver to the said Groves, the party of the second part, fifteen hundred gross tons, of 2,240 lbs. per ton, of good soft ore; which is to be the ore mined by Edmund Bullock, on the

lands of Alexander Montgomery, George A. Frick, William H. Magill and Jacob Hibler, where said Bullock is now engaged in mining; the said ore to be delivered at Columbia furnace in good order, and mined clean and free from dirt, slate and other impurities. The said party of the first part agree to deliver it regularly, at the rate of thirty tons per week; and commence delivering with the date of this article of agreement, and continue to deliver it at that rate until the whole quantity is delivered. And, in consideration of which, the party of the second part agree to pay for each and every ton gross, of 2,240 lbs., so delivered. $2 per ton of 2,240 lbs. as said before—that is: $1 per ton cash monthly, and the balance, $1 per ton, is to be charged in account; and at the expiration of one year, when it is presumed the ore is all delivered, give their negotiable note to the party of the first part, payable six months after date. If any of said ore should not be mined clean, and not be delivered in as good order as aforesaid, the party of the second part have the right to refuse to receive such load or loads. The party of the first part agree to bind themselves to the party of the second part to deliver the full quantity of said ore, and in such time as agreed upon, and for each and every ton not so delivered in the within specified time, the said Donaldson & McQuhae agree to pay, at the end of the year, to the said Groves, $2 per ton as liquidated damages; and the party of the second part agree to bind themselves to the party of the first part to pay also $2 per ton liquidated damages for each and every ton that they may refuse to receive, if mined as clean, and delivered in as good order as aforesaid.

It is agreed that if the party of the first part should not be able to deliver regularly thirty tons per week, on account of bad roads or obstructions in mining, it is agreed that they make said quantity up afterward, so as to average said thirty tons per week. The name "Alexander Montgomery" was interlined before signing; also the word "average" in place of "equalize" erased; the word "otherwise" erased.

DONALDSON & MCQUHAE,
J. P. & J. GROVE.

On part of plaintiffs a receipt, as follows, was read:

Received, 7th March, 1864, of J. P. & J. Grove, thirty-six

tons and fifteen cwt. of pig iron, delivered to sundry persons, as per our orders; and fifteen dollars per ton we consider having received on account of cash—part of soft ore delivered as per agreement, dated 30th July, 1845, amounting to the sum of five hundred and fifty-one 25-100 dollars; the balance, over and above the fifteen dollars per ton, considered as cash, is to be charged by said Groves in their account against us, or for which we are to credit them in our books.

$551.25 paid cash on account of soft ore.

DONALDSON & MCQUHAE.

Similar receipt of March 30, 1846, read:

Received, 16th June, 1846, of J. P. & J. Grove, thirty tons of "A" No. 1 pig iron, delivered to our orders, as follows, to wit: Ten tons to Moore & Biddle, 7th April, 1846; five tons to do., 16th April, 1846; ten tons to do., 13th May, 1846; ten tons to do., 8th June, 1846; out of which iron we consider as having received fifteen dollars per ton as cash on iron ore to be delivered by us to said Groves, as per agreement of 30th July, 1845. The balance of the said iron per ton, over and above the fifteen dollars, is to be charged in account against us—say thirteen dollars per ton, amounting to $455.

Thirty-five tons of iron at $15 per ton, considered as cash, and to be received as paid in cash; part of said iron ore, to be delivered, as per said contract of 30th July, 1845, amounts to five hundred and twenty-five dollars.

The balance of said iron is to be charged against us—that is, over and above the fifteen dollars per ton, allowed as cash —say $13 per ton, amounting to $455.

$525. DONALDSON & MCQUHAE.

On the part of defendant, Edmund Bullock was sworn.—I commenced first at Mr. Montgomery's, in the fall of 1844, or in October. In August, 1845, I mined at Frick, Hibler, Magill, and Montgomery's too. I was employed by Donaldson & McQuhae. I mined in September, in the same mines, and in October, and in November, and in December, till February. Mr. Grove got the ore that I mined in those mines. Grove did not get all the ore that I mined in the Montgomery vein at that time by thirty tons. Grove told me that those thirty tons of ore were too dirty and too wet. He said he would not take that. He did not say we should or should

not mine, but he would not take any more from the Montgomery vein; he said it was too dirty. The ore was as clean as it could be made by hands; they had taken all the lumps out of it; no better ore could have been taken out of the Montgomery mines; 70 or 80 tons yet might have been got out of the Montgomery mines—out of the two drifts of the Montgomery mines. Grove told me this in Danville, at his office; I did not say anything to Donaldson & McQuhae. This ore was afterward bought by Samuel R. Wood—the 70 or 80 tons. Samuel R. Wood got the 30 tons which were mined. These 30 tons were a part of the 70 or 80 tons. Grove afterward got ore out of the same mine. I believe he is getting ore out there now. It was in the beginning of November or December, 1846, Grove told me this; it would be in 1845. I went to Mr. Wood's, March 28th, 1846; this was the November or December before I went to Mr. Wood's. In the Montgomery mine, the hard and soft lumps were taken away by Mr. Grove; that which was left was the soft mushy stuff, such as could not be handled by the hand. I mined in the Frick & Hibler mine in August, 1845, until next January, for Donaldson & McQuhae. Mr. Grove got that ore. The reason I mined there no longer was, I got into a fault; a fault is where no more ore can be got out without a sight of expense. The ore was cut off by the slate; the ore was not all—quite all—taken out to this fault; a little was left. I did not say what time I came to this fault; I think it was about January; it would take three or four months to get through that fault. It would have taken eight or nine months to have put a drift in on a lower level, and strike the vein below. Absalom Diehl was one of the carters that hauled ore from the Montgomery mine. I told him (Grove) that the miners could not get it any cleaner than we did. I have worked eighteen years at mining; ten years mining ore in this region, etc., etc.

ABSALOM DIEHL.—I hauled ore from the Montgomery mine to Grove's furnace. Bullock mined it. I commenced hauling in the fall of 1845. The soft ore was wet, and Peter Grove found fault with it, and said I should bring the hard, and pick out that. There was some called limestone ore, and some soft ore; came out in blocks; I was to haul these. It appears to me I did take several loads that way, and Mr. Bul-

lock told me at last that if I did not take the soft ore, I should stop hauling the hard. I was employed to haul by Donaldson & McQuhae. It appears to me that I did tell Donaldson & McQuhae what Grove told me, but I won't be certain. I am not certain, but I think I told McQuhae.

CROSS-EXAMINED.—It was the ore I hauled from Montgomery's that Grove found fault with: I don't think that Grove found fault with the ore I hauled from Frick and Magill's.

After defendant had closed, plaintiffs called F. Bubb, and on his examination, it was proposed on their part to ask him whether or not there was plenty of soft ore on the Frick, Hibler & Magill tract in 1847. Counsel for defendant objects to the question, because the agreement was that the ore was to be mined, in the mines that were worked, by E. Bullock. The court sustained the objection, and counsel for plaintiffs excepted.

ANTHONY J., charged the jury, *inter alia*, that "the testimony of Edmund Bullock is important in the case, on the ground that he was the person mentioned in the agreement, who was to mine the ore on the lands of Montgomery and others; also, that the jury will observe that this may be considered a hard case, as the plaintiffs ask for liquidated damages," etc. (as stated in the third assignment of error). For some other parts of the charge, see assignments of error.

On the part of plaintiffs several points were submitted. The third point was that even if the jury should believe that one of the plaintiffs told Edmund Bullock, the miner of the defendants, that a part of the ore mined on the Montgomery tract was dirty, and too wet, and that he would not take it, and when told that the miners could not get it any cleaner, said he would not take any more from the Montgomery vein—that it was too dirty—yet this would not excuse Donaldson & McQuhae from the performance of their contract to deliver 1,500 tons within the time specified in the article of agreement; and, more especially, as there is no evidence that these declarations were communicated to Donaldson & McQuhae.

ANSWER BY THE COURT.—Where a contract is made for the performance of certain acts, the promisor will be discharged from his liability if the other party do any act which renders it impossible for the former to perform his engagement, or

omit to perform some act necessary to be performed on his, the promisee's, part; and in such case the promisor stands in the same situation as though the performance of the contract had been perfected. By the terms of the agreement, Donaldson & McQuhae agreed to sell and deliver to the Groves 1,500 tons of good soft ore, to be the ore mined by Edmund Bullock on lands of Alexander Montgomery, and of Frick, Magill & Hibler, where Bullock was then engaged in mining. It was to be delivered in good order, and mined clean and free from dirt, slate and other impurities. Edmund Bullock was to mine the ore. He did so, and says it was as clean as it could be made by hand. "No better ore could have been taken out of the Montgomery vein." What was got out by him, that was refused by Grove, was afterward bought by Samuel R. Wood. He also says that Grove complained that the thirty tons of ore, afterward got by Wood, were too dirty and too wet—that Grove said he would not take that; "He would not take any more from the Montgomery vein." Grove said it was too dirty; the teamsters had taken all the lumps out of it. Thomas Bullock also testifies that he called the ore in the Montgomery vein good ore. He mined in that mine in 1845 and 1846, and says that no better ore could have been got out of that mine—neither better nor cleaner. Now, if the jury believe that the ore which Grove refused to take from the Montgomery vein was "good soft ore," and that Bullock took it out as clean as could be made by hands, that no better ore could have been got out of the Montgomery mine, although it was of the soft kind, this refusal of Grove to take the ore would excuse Donaldson & McQuhae from the performance of their contract to deliver 1,500 tons within the time specified in the article of agreement, and as Edmund Bullock was the person who was to mine for Donaldson & McQuhae by the terms of the agreement, it is of no consequence whether the declarations of Peter Grove were communicated to Donaldson & McQuhae or not, if Edmund Bullock, in consequence of Grove's declaration that he would receive no more from the Montgomery vein, quit working for Donaldson & McQuhae, and left the mine.

4th point. That there is no evidence in this cause of any acts done or declarations made by either of the plaintiffs, that

would excuse Donaldson & McQuhae from the performance of their contract to deliver the 1,500 tons of soft ore, and the verdict of the jury ought to be for the plaintiffs.

Answer. The court refuse to answer this point as requested, and for a full answer thereto refer to our answer to the third point.

5th point. That the verdict of the jury ought to be in favor of the plaintiffs for the sum of $1,163.25.

Answer. The court refuse to answer this point as requested, and leave the matters of fact to the jury.

On the part of defendant points were submitted.

1st point. That if the jury believe that in November or December, 1845, J. P. Grove told Edmund Bullock, the man selected by the parties to the agreement as the person to mine the ore, that he would not take any more ore from the Montgomery mine; that having thus refused to accept that ore, plaintiffs can not recover damages of defendants for not delivering the whole 1,500 tons.

To the first point the court answer in the affirmative.

2d point. That if Grove told Bullock that he would not accept any more ore from the Montgomery mine, the defendants were relieved from their contract to deliver any more ore.

To the second point the court answer in the affirmative.

3d point. Even if the jury believe that defendants delivered some ore after the refusal by plaintiffs to accept the ore mined from and in the Montgomery mine, it does not relieve the plaintiffs from the effect of their refusal.

To the third point, the court answer: The acceptance of ore from the mine of Frick, Magill & Hibler, after the refusal by plaintiffs to accept the ore mined from and in the Montgomery mines, would not relieve the plaintiffs from the effect of said refusal, provided that Donaldson & McQuhae were prevented thereby from furnishing a sufficient quantity of ore to the plaintiffs. Donaldson & McQuhae had a right to take out "good soft ore" either from the mine of Montgomery, or of Frick & Co., and if the Groves refused to take ore out of the Montgomery mine, Donaldson was thereby released from delivering the whole quantity out of the mines of Frick & Co.

4th point. That if the jury believe that plaintiffs told Absalom Diehl to pick out the hard ore and lumps and leave the soft ore mined in the Montgomery mines, and that Diehl told the same to the defendants, it is such an interference with and violation of the contract by the plaintiffs as released defendants from the further performance of the contract.

To the fourth point the court answer: That the telling of Absalom Diehl, by the plaintiffs, to pick out the hard ore and lumps and leave the soft ore mined in the Montgomery mines, is not such an interference with and violation of the contract of plaintiffs as would release defendants from the further performance of the contract, although Diehl communicated the same to the defendants; but the refusal of the plaintiffs to take any more ore from the Montgomery mines would have that effect.

Verdict rendered for defendant.

It was assigned for error that the court below erred.

(1.) In refusing to permit the question by plaintiffs, as per their bill of exception.

(2.) In charging the jury:

1st. That "the testimony of Edmund Bullock is important in this case, on the ground that he was the person mentioned in the agreement who was to mine the ore on the lands of Montgomery and others."

2d. That "if they believed that the ore taken out by Bullock was good soft ore, and that Groves refused to receive it, and in consequence thereof Bullock quit mining for Donaldson & McQuhae, so that they could not perform their part of the contract, then Donaldson & McQuhae would be relieved from their part of the contract, and were not bound to continue to offer ore to the acceptance of the Groves, but in consequence of the refusal of Groves to take ore from the Montgomery mines, Donaldson & McQuhae might treat the contract as at an end."

3d. That "this might be considered a hard case, as the plaintiffs ask for liquidated damages at the rate of $2 per ton for not delivering 753 tons of ore, which was the same price Donaldson & McQuhae were to get for delivering it to J. P. & J. Grove. The miner had run foul of a fault, and

was stopped from getting out ore in the Frick & Co. mine, on account of the slate rock, which stopped his progress, and Grove told Bullock that he would not take any more from the Montgomery vein. We, therefore, instruct you that if the plaintiffs interfered with the contract, and prevented the defendants from delivering good soft ore, from the Montgomery vein, by the refusal to accept it from the miner, such refusal would discharge Donaldson & McQuhae from their obligation to deliver the ore according to the terms of the contract."

4th. That "it is alleged by the counsel for the plaintiffs that this receipt (receipt dated June 30, 1864) shows that the contract was still in force when the receipt was given. Of this the jury will judge when they take it, together with the other testimony in the cause, into consideration. The receipt speaks of ore to be delivered, and would imply ore which was to be delivered by Donaldson & McQuhae to the Groves, but there is other evidence in the cause, which the jury will also consider, and determine from the whole evidence, whether the contract was or was not ended, from what took place between the parties."

5th. In their answers to plaintiffs' third, fourth and fifth points.

6th. In their answers to defendants' first, second and third points, and in the last sentence of their answer to defendants' fourth point.

COMLY & BALDY, were for Grove and Grove, plaintiffs in error.

PLEASANTS, for defendant in error.

The opinion of the court was delivered August 1, by

ROGERS, J.—This is an action of assumpsit, to recover liquidated damages for the non-performance of a written contract. It is not pretended by the defendant that the agreement was performed on his part, but he insists that performance was prevented by the acts of the plaintiff himself. If so, the defendant has a complete defense to this action, as it is unquestionable that one party may show by parol that the other party has waived or prevented performance of a contract, either written or parol. A party who dispenses with or pre-

vents performance of a contract, can not take advantage of the non-performance by the other: 4 United States Dig. 84, pl. 503; 11 Shep. 36; 7 United States Dig. p. 31, pl. 222; 4 Id. 93, pl. 688. The defendant agreed for a certain stipulated price, to sell and deliver to the plaintiff for the sum and at the time mentioned in the contract, fifteen hundred tons of good, soft iron ore, to be the ore mined by Edmund Bullock, on the lands of Alexander Montgomery, George A. Frick, W. H. Magill and Jacob Hibler, where said Bullock is now engaged in mining. It is very plain it was the intention of the parties that the defendant should have the liberty of selecting the ore of the quality described, from either the Montgomery or the Frick mine. His range was not confined to one or the other, but if he took the ore from any ore veins worked by Bullock (provided it answered the description of good, soft ore), it was a full compliance with the stipulation in the contract. It was a matter of no consequence to the plaintiff from which the ore was taken, provided it was of the quality agreed upon; but it was of the first importance, as the event showed, that the defendant should not be confined, except within the prescribed limits. It was of serious detriment to him to be compelled to raise the ore from the Frick mines, as taking it from those mines was attended with an increased expense, arising from the fault of which the witnesses speak.

Had there been no interference with the unquestionable right of the defendant to mine in the Montgomery vein, the contract may have been performed to the letter, by the delivering in due and proper time, the whole amount of ore plaintiff was entitled to receive. It must be remarked, there was plenty of ore in Montgomery's mine to fulfill the contract, and it is in proof that upward of 1,000 tons were taken from that mine by the plaintiff himself, since the defendant ceased to deliver ore in pursuance of the agreement.

The court was, therefore, right in ruling, that if the plaintiff interfered with the contract, and prevented defendant from delivering good, soft ore, from the Montgomery vein, by his refusal to accept it from the mine, such refusal would discharge Donaldson & McQuhae from their obligation to deliver the ore according to the terms of the contract. This was the

point on which the whole case turned, and this point was properly referred to the jury. The jury have found that the defendant tendered good, soft, iron ore, such as is described in the contract; that the plaintiff refused to receive it, declaring at the same time that he would not take any more from the Montgomery vein. His excuse was, it was too dirty, although the witness deposes it was as clean as it could be made by hands. Nor will it alter the case, that after the refusal, the defendant mined and delivered ore from the Frick vein, until he came to a fault, which (in the apprehension of the miner in whose experience the parties appear to have placed confidence), could not be pierced without great expense. Under these circumstances the defendant was at liberty to consider the contract at an end, inasmuch as plaintiff himself had interfered with the contract, by refusing, improperly, to receive ore from the Montgomery vein. The defendant was warranted in the belief that the plaintiff meant what he said; and, if so, that it would be needless to tender ore from that mine, which had been before peremptorily refused. And this would seem to have been the understanding of both parties. We hear of no remonstrance on their part for the non-fulfillment of the contract. The matter is suffered to rest for three years, which of itself is strong evidence, from which the jury might presume a mutual abandonment: 7 Scott 395,[1] TINDAL, C. J. BOSANQUET, J., says, contracts may be abandoned otherwise than by words; the conduct of the parties and relative situations to each other are to be considered. COLTMAN, J. I think the jury might well conclude that by mutual consent the contract was treated as ended.

The court was justified in instructing the jury that if they believe the ore was good, soft ore, and Grove refused to receive it, and that in consequence of it Bullock quit mining, defendants would be released from their contract, and would not be bound to continue to offer ore to Grove. It is difficult to account on any hypothesis but the abandonment of the contract, for the sudden ceasing to deliver ore, after Grove's declaration to Bullock, the great length of time that elapsed without one word of complaint, and the settling in a most friendly manner, a short time after, the price of pig iron re-

[1] *Lawrence* v. *Knowles.*

ceived in payment by defendants as cash for the ore delivered.

But it is strenuously contended, the court erred in instructing the jury that the testimony of Edmund Bullock is important in this cause, on the ground that he was the person mentioned in the agreement to mine the ore on the land of Montgomery and others. I am free to confess that my first impressions were that the court had laid too much stress on the testimony of Bullock, but on further reflection, I have been inclined to change the opinion first formed. The defendant bound himself to deliver to the plaintiff 1,500 tons of good, soft ore in good order, mined clean and free from dirt, slate and other impurities, to be the ore mined by Edmund Bullock, on the lands of Alexander Montgomery, George A. Frick, William H. Magill and Jacob Hibler, where said Bullock is now engaged in mining; the said ore to be delivered at Chambers' furnace, in good order and mined clean and free from dirt, slate and other impurities. That part of the agreement is certainly not very explicit, but I am inclined to adopt the reading of the defendant's counsel. The parties would seem to have put great trust and confidence in Bullock, because, I suppose, he was an experienced miner, who had been engaged in the business for many years, and was, no doubt, by reputation at least, well known to both. He was, therefore, constituted in some measure the agent of both in it, as well as the organ of communication between the parties. Unless this was the case, it is difficult to understand why his name was introduced into the agreement at all, as it would not be needed for purposes of designation, as the mines were sufficiently described by the appropriate names of the Montgomery and Frick mines. If this be so, the court was right in considering his testimony as important, for a refusal to receive the ore from him is the same as if the refusal had been made directly to the defendants themselves. Notice to them would be unnecessary. Indeed, proof of a refusal to him, who was certainly their man of business, would raise an almost uncontrollable presumption that it was communicated to his principals.

The counsel for the plaintiff in error contended that the court had no right to charge the jury that this was a hard case. He justly says the agreement was fairly entered into

by the parties, without surprise or imposition of any kind practiced by either; each party is equally stringently bound, and the stipulations are of such a nature that either party could easily fulfill their part of the contract to the letter, if they had endeavored in good faith to do so. If the court had, as the counsel supposes, charged the jury it was a hard case merely because the damages were liquidated, it would be obnoxious to the objection made; but I do not so understand the court. They say it is a hard case in view of all the circumstances, viz., that the miner had run foul of a fault and was stopped from getting out ore in the Frick & Co. mine, on account of the slate rock, which stopped his progress, and that Grove told Bullock that he would not take any more from the Montgomery vein. To subject the defendant, as is clear, to heavy and exorbitant damages under such a state of facts, would not only be hard, but oppressive. In this instruction I fail to perceive any injury of which the plaintiffs can justly complain.

In the argument great stress was laid on the receipt of the 16th June, 1846, showing, as the plaintiff contends, that the contract was still in force when the receipt was given. The construction of the receipt as far as it went, was favorable to the plaintiff in error, but the court properly referred it, together with all the other testimony in the cause, to the jury. The court say, the receipt speaks of ore to be delivered, and would imply ore which was to be delivered by Donaldson & Mc Quhae to the Groves; but there is other evidence in the cause which the jury will also consider, and determine from the whole evidence whether the contract was or was not ended; they will determine from what took place between the parties. Had the court undertaken to say that the receipt was of itself conclusive evidence that the contract was then a subsisting contract, it would have been erroneous, as undoubtedly it was their duty to refer that fact, with the attending circumstances, to the jury.

On a careful examination of the whole case, no error is perceived which would justify the court in reversing the judgment.

Judgment affirmed.

MORROW v. WALTZ.

(18 Pa. St. 118. Supreme Court, 1851.)

Conditional contract—Developing salt well. An instrument as follows: "April 29th, 1841, Jacob Waltz, Jr., do promise to pay unto William Morrow the sum of $200 if said Jacob Waltz can get the salt well to do a good business; that salt well that Waltz and Morrow bought of Henry Taggart in Jefferson county, Ohio, on Island Creek." (Signed) "Jacob Waltz, Jr.," implies no obligation upon Waltz to endeavor to get the salt well to do a good business; and without such event no liability attaches.

Error to the Common Pleas of Westmoreland County.

This was an action on the case by William Morrow against Jacob Waltz, Jr., founded on an instrument as follows:

"April 29th, 1841. Jacob Waltz, Jr., do promise to pay unto William Morrow, the sum of $200, if said Jacob Waltz can get the salt well to do a good business; that salt well that Waltz and Morrow bought of Henry Taggart, in Jefferson county, Ohio, on Island Creek. JACOB WALTZ, Jr."

In the declaration the note was referred to, and it was alleged that the defendant *could have got* the salt well to do a reasonably good business, yet the defendant hath not paid the sum of $200, or any part thereof.

On the part of the plaintiff, an extract from a deposition was given in evidence, viz.: "I have no knowledge of Waltz having made any attempt to manufacture salt there since he left the works in 1840."

Plaintiff then read an extract from another deposition, viz.: "I do not know that he, Waltz, attempted to manufacture salt at that time, or at any period subsequent to his taking the tubing away; the last time that I know of Waltz being there was when he took the tubing from the works."

The plaintiff then called a witness, who testified: "I do not know that Waltz has never manufactured salt since date of note. I heard Waltz say he had been back after we were there. Waltz has lived at the mills ever since he came back from the works in Ohio."

The counsel of the defendant demurred on account of the insufficiency of the evidence. Defendant's counsel joined in the demurrer.

It was contended, on the part of the plaintiff, that he was entitled to recover without showing that the defendant could have got the salt well to do a reasonable business, if an effort had been made; but that it was incumbent on the defendant to show that it *could not be done*, after reasonable diligence to effect it.

Sept. 15, 1849, KNOX, J., being of opinion that the evidence was insufficient to make out a cause of action, directed judgment to be entered for defendant with costs.

FOSTER, with whom was WOODS, for plaintiff in error.

COWAN, for defendant.

GIBSON, C. J.

The consideration of this contract belongs to the class called executory. It is distinguished in Chitty on Contr. 63, and 1 Chitty Plead. 290, from past or executed considerations, and from those belonging to the other classes. This contract and the consideration of it, are distinct things, and to found an action on the former, it is in general necessary, it is said, to aver and prove performance of the latter. Is the present case an exception? The promise is to pay "If the said Jacob Waltz can get the salt well to do a good business." Can he demand the reward before he has shown that he earned it by performance of the work? It is a general rule of evidence that a party is not to be called on to prove a negative; but the objection lies deeper. A conditional offer like this is in truth not a contract at all, because it binds neither party before the contract is executed.[1] The party who makes it may withdraw it, and the party to whom it is made is not bound to accept it. If one man say to another, I will give you so much if you will do me such or such a service, and he does it before retraction, he may demand it by action, but to prove the contract he must prove performance of it on his part, as an integrant part of it. Before performance, or at least acceptance, what is inaccurately called a contract by text writers, is no more than a proposal, as it was treated in *Clark* v. *Russel*, 3 Watts, 216; but when it is accepted and assented to by both

[1] *Finerty* v. *Fritz*, 1 M. R. 438.

parties, it becomes by the *aggregatio mentium* a special contract, binding on both parties, of which the consideration is promise for promise. In the present case there is no evidence that Morrow had accepted the offer, certainly none that he had performed the consideration, and even where promises are dependent, the party who calls for execution of the contract makes performance of his part of it a condition precedent. The plaintiff's evidence, therefore, taking it to be true, and admitting every fact that a jury could legitimately infer from it, failed to make out a case.

Judgment affirmed.

PHILLIPS & RAY v. JONES' ADMINISTRATOR.

(20 Missouri, 67. Supreme Court, 1854.)

Sale of prospector's interest—Outfit. Jones was one of a company organized to go to California. He owned a share and a half in the outfit. By writing, he sold to B "one half of his interest in the company," qualified afterward by a claim that B should not be a partner in the company, but only purchaser of one half of Jones' interest in the "metals and ores" to be obtained. *Held*, no conveyance of any part of Jones' interest in the outfit.

Error to the Circuit Court of Marion County.

In 1849, Jones and others formed a joint stock company for the purpose of going to California in quest of precious metals. Jones owned one share and a half of the outfit, to pay for which he borrowed $500 of Phillips & Ray, in consideration of which he executed to them a writing by which he sold "one half his interest" in the company, and authorized them to receive from the manager or managers of said company, "one half of all the gold or silver, ores or metals" to which he might be entitled on account of his one share and a half. A subsequent clause was as follows: "It is further agreed that said Phillips & Ray are not partners in said company, but are only purchasers of one half said Jones' interest in the metals and ores that may be by him obtained as his share in the company." While the company were on their

way to California, Jones died. The surviving members proceeded on to California, where they immediately sold their joint outfit and dissolved. Jones' proportion of the proceeds of the outfit was paid to George W. Lane, who afterward executed to the administrator of Jones his note for the amount.

The present suit was begun by Jones' administrator against Lane, upon the note. Lane answered, admitting the execution of the note, but setting up the claim of Phillips & Ray, and praying that the parties might be compelled to interplead.

Phillips & Ray thereupon filed their interplea, claiming the amount of the note, upon which an issue was made and found against them, the court refusing to instruct the jury, as asked, that the writing vested in Phillips & Ray one half of Jones' share in the outfit of the company. The interpleaders sued out this writ of error.

GLOVER & RICHARDSON, for plaintiffs in error.—1. The conveyance by Jones to Phillips & Ray passed to them one half of his interest in the outfit of the company. This was the only interest in the company which Jones then had. It could not have been designed to leave out of the conveyance the outfit which the grantees had just advanced the money to pay for. 2. As the parties have consented that an issue should be made upon the interplea for the settlement of their rights, this court should now pass upon them.

T. L. ANDERSON, for defendant in error.—By the express terms of the agreement, Phillips & Ray were not partners, and the only interest they acquired was in the ores, metals, etc.

SCOTT, Judge, delivered the opinion of the court.

As the question was not raised, we will not determine whether this was a proper case for an interpleader, and whether Lane would not have been entirely justified by the law in paying the note to the administrator to whom he gave it. We are of the opinion that no part of the proceeds of the note belonged to the plaintiffs in error, Phillips & Ray. The first clause in the agreement by which Jones, the intestate, conveyed to the plaintiffs in error one half of his interest in the California company, was no doubt sufficiently comprehensive to have included an interest in the stock of the company.

But after these general words, it is stipulated, and that too, it would seem, with a view to explain what had gone before, that Phillips & Ray should not be partners in the company, but only purchasers of one half of said Jones' interest in the metals and ores that might be by Jones acquired as his share in the said company. Phillips & Ray could not but be partners, if they owned a share of the stock of the company. The only way to give effect to this stipulation would be to divest them of all interest in the stock or outfit. But the subsequent words place the matter beyond all doubt. They were not to be partners, but only purchasers of one half of Jones' interest in the metals and ores that might be obtained as his share. The rule that every part of an instrument should have effect in interpreting it, must be subservient to the more important rule which requires that the whole deed must be taken together in order to ascertain the intent of the parties.

The judgment is affirmed, the other judges concurring.

CHAPMAN v. BRIGGS IRON COMPANY.

(6 Gray, 330. Supreme Judicial Court of Massachusetts, 1856.)

Ore contract with furnace. An agreement by a corporation to purchase "all the iron ores the said company, their agents or assigns, may want for the use of their furnace for the term of three years" binds them to pay for ores delivered to and accepted by them, or their general agent,[1] though not actually used by them. And the entries in their books are admissible in evidence to prove such acceptance.

Practice—Appeal. No appeal lies from a judgment of the court of common pleas rendered upon the report of an auditor, in which the evidence is stated in detail, without submitting the auditor's report to the jury, or its being agreed upon by the parties as a statement of facts.

Action of contract, commenced in the Court of Common Pleas, to recover compensation for iron ore dug and delivered to the defendants, under an agreement in writing (on which the plaintiff counted) made with the defendants by Hector Winchell and the plaintiff, on the 6th of September, 1848, and all Winchell's interest in which had been assigned to the

[1] See *Grove* v. *Donaldson*, 2 M. R. 507; *Adams Co.* v. *Senter*, 1 M. R. 241

plaintiff, with the defendants' assent, and by which Winchell and Chapman agreed to supply the furnace of the defendants at Lanesborough, for the term of three years from the date of the agreement, "with all the iron ores the said Briggs Iron Company, their agents or assigns, may want for the use of the said furnace, for the said term of three years, in manner and upon the conditions, and subject to the reservations and restrictions hereinafter set forth, namely: that they will within one week from the date hereof, commence operations upon the ore bed in Lanesborough, known as the Sherman ore bed, and take therefrom, and deliver upon any part of the bank of said furnace, when directed by any person having in charge the operations of said furnace, at least fifty tons of ore from the said Sherman ore bed, on or before the 15th day of October next, and ever after, during this lease, keep upon the bank aforesaid, at all times, at least one hundred tons of said ore, unless notice is given them that the ore thus delivered accumulates faster than is desirable or that no more ore is wanted at the furnace."

The case was referred to an auditor, who made a report to the court of common pleas, stating in detail the evidence introduced before him upon the question of the delivery and acceptance of ore, and reporting a balance due the plaintiff, if he was entitled to recover for ore actually delivered by him, though not used by the defendants; otherwise a balance due to the defendants. The court of common pleas, after hearing the parties, gave judgment thereon for the plaintiff, and the defendants appealed to this court, where the case stood for argument at September term, 1855. But the full court then dismissed the appeal, on the ground that the auditor's report, under the Rev. Sts., C. 96, § 30, was mere *prima facie* evidence to be submitted to a jury, and not having been so submitted, nor agreed upon by the parties as a statement of facts, the judgment of the court of common pleas thereupon was irregular, and was not a judgment upon a matter of law apparent on the record; and therefore no appeal lay from it under St. 1840, C. 87, § 4.

Case remitted to the court of common pleas.

A trial was had in that court at October term, 1855, when the plaintiff gave in evidence the contract and the auditor's

report, the substance of which is sufficiently stated in the bill of exceptions allowed by BYINGTON, J., the material part of which was as follows:

"In relation to the ore dug and delivered, but which had not been used by the defendants, the court ruled that there was a question of fact to be settled by the jury, namely, to determine whether the defendants received and accepted the ore under the contract, which had been dug and delivered, though not used. This question was submitted to the jury upon the evidence stated in said report which tended to show, that besides being delivered on the bank of the defendants, it was weighed by them and credited to the plaintiff on the defendants' books, and some payments made by them on account of the same. And on the part of the defendants was evidence tending to show that notice was given by the defendants to the plaintiff, as provided in the contract, that ore was accumulating too fast, and not to deliver ore; and evidence tending to explain the facts in regard to crediting and weighing and paying for the ore. The case was submitted to the jury.

"The defendants asked the court to instruct the jury that by the true construction of the contract, the plaintiff was only entitled to deliver and receive pay under the contract for the ore which the defendants might want for the actual use of the furnace during the time named; and that for all ore delivered by the plaintiff, beyond the amount required for the use of the furnace during the three years, the plaintiff could not recover in this form of action.

"The court declined so to instruct them; and did instruct them, that if the jury found that the plaintiff delivered the ore, and the same was accepted by the defendants under the contract, the plaintiff was entitled to recover for it, though it was not wanted to be used within the three years embraced in the contract; for it was for the defendants to determine how much they wanted to be used, and their determination, made and acted upon by the parties, was binding upon the defendants; but if not wanted for use, and not accepted by defendants, the plaintiff could not recover, if notice was given that it was accumulating faster than was needed.

"The auditor allowed Mason S. Palmer to testify, in answer to a question of the plaintiff, and against the defend-

ants' objection, that he did, after the contract was made, state to the plaintiff how much ore the defendants would probably use or need from him during the three years. From the evidence it appeared that Palmer was the general agent of the company, and it was admitted or proved that he had the general charge of the business; that it was his business to receive the ore under this contract, to determine how much was wanted under the contract, and the defendants had no other agent to act for them under the contract.

"In relation to the agent's authority, the defendants requested the court to instruct the jury, that the general agent of the company, and the subordinate agents, as such, would have no authority to receive, and bind the defendants to pay for ore delivered under color of the contract, and exceeding the amount limited in the contract, without express authority conferred upon such agent after the contract was entered into by the defendants; the general authority of such agent being limited by the terms of the contract.

"The court declined so to instruct, and instructed them, that the acceptance of ore by the general agent of the company for the company, would bind the company, as he had the general charge of their business, and it was his business to receive the ore under the contract, to determine how much ore was wanted to be used under it, and the defendants had no other agent to act for them under the contract; although such general agent may have accepted more than the company wanted to be used; if the plaintiff delivered it under the belief he had such authority to receive it, and such agent received it claiming to act under the contract in receiving it.

"The jury found a verdict for the plaintiff for the ore delivered which had not been used, and to the foregoing instructions to the jury the defendants except."

J. D. COLT, for defendants.

I. SUMNER, for the plaintiff.

BY THE COURT. The instructions of the court of common pleas were entirely correct, and well adapted to the case.

Exceptions overruled.

GRIFFITHS v. RIGBY ET AL.

(1 H. & N. 237. Court of Exchequer, 1856.)

[1] **"Fairly wrought" construed.** There was a demise of coal lands at an annual rent, which was to cease when the coal could no longer be "fairly wrought." The court below left the meaning of the expression to the jury. *Held*, that the jury should have been directed as to the meaning of these words, and that they meant, such coal as could be fairly and properly gotten, according to mining usage, without extraordinary difficulty or expense, and that profit was not an exclusive test of their meaning.

The action was *Covenant*, and the declaration stated that by indenture dated, etc., the plaintiff demised to the defendants the mines, veins, seams, and beds of coal, cannel coal and slack which could, should, or might be opened, found or discovered during the term under certain pieces of land in the indenture mentioned, together with power to search, raise, and get up all the coals, cannel or slack, and to use all lawful means for finding and working the same, and for the avoidance and carrying away of water; and also full liberty during the term, to take and carry away with horses, etc., all the coal to be wrought or gotten from and out of the said lands, etc., to hold the said mine, etc., and the privileges, etc., to the defendants from the day of the date of the said indenture for the term of thirty years; yielding and paying to the plaintiff after the rate of 300*l.* for every statute acre of all the main coal, and 100*l.* for every statute acre of all the hollin, brassy, and rough coal, which should, during the term, be found and obtained under the said premises; by annual payments of not less than 150*l.* for the main coal, and 50*l.* for the brassy, hollin, and rough coal, making together the sum of 200*l.* on the 27th day of January in each year; provided, that in case the whole of the said coals under the said lands, so far as the same could be fairly wrought, should have been worked out and gotten at any time prior to the expiration of the said term of thirty years; and that said coal so fairly wrought should have been wholly paid for after the rate of 400*l.* for every statute acre

[1] Cited, Rogers on Mines, 394, 414; Bainbridge on Mines, 209, 228. To the same effect is *Morris* v. *Smith*, 3 Doug. 279; *Post* FAULT; and see Note, *post p* 531.

thereof, then and from thenceforth the annual payment of 200*l.* should cease and be no longer payable; but if it should happen that all the said coal, so far as it might be fairly wrought as aforesaid, should not be worked out and gotten within the term, then that the defendants should pay to the plaintiff the balance which should be due to him at the end of the term for all such coal after the rate of 400*l.* for every statute acre as aforesaid, that is to say after the rate of 300*l.* for every statute acre of the main coal, and 100*l.* for every statute acre of the hollin, brassy, and rough coal, which might then remain ungotten through the neglect or default of the defendants; and the defendants covenanted with the plaintiff that they would pay the sum of 200*l.* in each year during the term for, and on account of the said sum of 400*l.* reserved as aforesaid, for every statute acre of the said coal so distinguished as aforesaid, unless the same should be sooner fairly worked out and wholly paid for, and that the defendants would work the mines in a proper and effectual manner. BREACH: That the defendants did not continue to work the mines in a proper and effectual manner, but therein made default; and that the whole of the coal under the said lands so far as the same could be fairly wrought had not been fairly worked out.

PLEAS (*inter alia*).—First that the defendants continued to work the mines in a proper and effectual manner according to the true meaning of the said indenture; secondly, that they continued to work and carry on the mines in a proper and effectual manner from the time of making the covenant till the whole of the coal which could be fairly wrought, became and was worked out, and that before the commencement of this suit, the whole of the coal under the said lands which could be fairly wrought, became and was worked out and gotten, whereupon the defendants from thenceforth ceased further to work and carry on the said mines.

At the trial before ERLE, J., at the last assizes for the county of Flint, it appeared that the arrangement of the strata was as follows: Below the clay and slate is the hollin coal; below this is the brassy coal, and lowest of all the main coal. It was admitted that the defendants had not worked the brassy coal. The brassy coal was about three feet seven inches thick. It was stated by the plaintiff's witnesses to be a seam of sal-

able coal, capable of being worked at a fair profit; that there was a good roof and little water.

The defendants' witnesses said that the roof was bad, and that the seam was full of faults—of little value and could not be worked at a profit. Some of the witnesses stated that no brassy coal was worth working. The defendants' counsel urged that the question was whether this seam of coal could be worked at a profit. The learned judge told the jury that he would not give any explanation as to what was meant by "fairly wrought"; that the jury must judge of that; they were better judges of the meaning of the phrase than he was; he thought that it meant what could be got by a prudent person with a fair profit, however small. He said that if the defendants had worked out all the brassy coal that could be fairly wrought, they were entitled to the verdict.

The jury found a verdict for the defendants.

WELSBY, in easter term, had obtained a rule for a new trial, on the ground that the verdict was contrary to the evidence and that the learned judge misdirected the jury in omitting to state to them what construction ought to be put upon the words "fairly wrought," in the lease.

HAYES, Serjt., MCINTYRE and COXON, now *showed* cause.

The expression "fairly wrought," means workable at a profit. The defendants were not bound to work at a loss, nor unless they could get some profit—not necessarily a great profit, nor even an average profit. If the meaning of the expression is matter of law, then the court can now see what is the meaning of it. If mining usage has given it a particular meaning, there was no evidence of such usage in the present case. In *Jones* v. *Shears*, 7 C. & P. 346, (E. C. L. R. Vol. 32,) under an agreement to work a colliery "as long as it was fairly workable," it was held by COLERIDGE, J., that the defendants were not obliged to go on working as long as there was any coal to be found; they were not obliged to work at a dead loss. All the evidence was directed to the worthless character of the coal.

WELSBY, and E. BEAVAN, who appeared in support of the rule, were not called upon.

Pollock, C. B.

We are all of opinion that the direction of the learned judge was insufficient, and that the verdict can not stand; therefore there must be a new trial. Profit is not the test whether this coal can be fairly wrought, though in one sense it is so, because the usages of mining are founded on what can be done advantageously. "Fairly wrought" means that which can be fairly and properly gotten, according to mining usage, without extraordinary difficulty or expense.

Alderson, B.—I am of the same opinion. Surely it could not be contended, that if the market price of brassy coal were to fall, in consequence of the supply exceeding the demand, the defendants would be relieved from the liability to work. Some evidence seems to have been given that no brassy coal could be worked at a profit. The question however is, assuming that brassy coal in its usual state can be worked, was this brassy coal such as was fairly workable?

Martin, B.—I am of the same opinion. I think that the judge was bound to state the meaning of the words in question, or to sum up the evidence as to it, and ask the jury what they thought was the particular local meaning, if any.

Rule absolute.[1]

McClelland v. Snider.

(18 Illinois, 58. Supreme Court, 1856.)

Quarrying—Rate of payment. Where plaintiff agreed to quarry stone at a fixed price or rate, and the contract was not fully completed, the rate agreed on must still govern as to the amount of stone which was quarried.

Breach of contract. A contract for the delivery of stone, to be measured in the walls of a particular building is not broken by the stone being laid elsewhere, if they could there be measured. The object of such a

[1] The meaning of the *Contract* rests with the court, notwithstanding the presence of *words*, whose meaning is to be found by a jury: *Hutchison* v. *Bowker*, 5 M. & W. 535. For construction of like terms, see *Jones* v. *Shears*, 7 Car. & P. 346; *Lewis* v. *Fothergill*, L. R. 5 Ch. App. 103; *Smart* v. *Morton*, 5 El. & B. 30; *Lewis* v. *South Devon Co.*, 2 Ex. 725.

statement in the contract was to furnish proper facilities for measurement.

Appeal from Marion.

This was an action on special contract. The declaration alleges that Snider was to quarry seven hundred yards of stone, and deliver the same to McClelland as fast as quarried, which McClelland was to remove, paying therefor one dollar and ten cents per yard, to be measured in the wall of certain buildings which McClelland was to erect for the Illinois Central Railroad Company. McClelland filed the general issue and gave notice that he should show that Snider was to deliver 1,300 yards of stone at one dollar per yard, and that he had refused so to deliver the stone, whereby McClelland had been made to suffer damage.

The proof showed that a portion of the stone taken by McClelland went to a well; that the amount of stone delivered fell short of the quantity contracted for.

The cause was tried before BEECHER, Judge, and a jury, at May term, 1856, of the Marion Circuit Court, and resulted in a judgment for the plaintiff, Snider, from which McClelland appealed.

J. N. HAYNIE, for appellant.

H. K. S. OMELVENEY, for appellee.

CATON, J.

The first and second instructions which the court gave for the plaintiff below were wrong. The first excepted to is as follows: "If the jury believe, from the evidence, that there was a special contract between the parties in relation to quarrying stone, although the same might not have been performed by either party, yet if plaintiff quarried and delivered stone to defendant, and defendant accepted and appropriated the same to his own use, the plaintiff is entitled to recover the reasonable value of the stone, deducting therefrom any damages sustained by defendant by failure of plaintiff to deliver the same according to contract, and any payment made on the same." This instruction was wrong because it allowed

the plaintiff to recover the reasonable value of the stone, irrespective of the contract price; whereas, the rule of law is, that the contract price shall govern the measure of compensation, wherever it can be made to apply, whether that be more or less than the reasonable value of the stone. This identical question, in almost precisely such a case, was decided at the last term of this court in this division, and demands no further discussion here. Had that case been reported at the time of the trial of this cause, no doubt the instruction would have been different. See *Brigham* v. *Hawley*, 17 Ill. R. 38.

The next instruction excepted to is this: "If the contract was to measure said stone in the walls of the depot building in Centralia, and defendant appropriated said stone to other purposes, as wells and culverts, not stipulated for in said contract, it was a breach of said contract, and releases the plaintiff from his liability on the same." This instruction was clearly wrong. It was a matter of no moment what became of the stone, so far as the plaintiff was concerned, if he had the proper facilities for measuring them. The only object of the provision that they should be measured in the walls of the depot, was to provide a rule by which they should be measured; not that the stone should have a particular spot for a resting place. The object of the provision was as well attained by placing the stone in one wall as another, so that it was accessible.

The judgment must be reversed and the cause remanded.

Judgment reversed.

BEEM v. MCKUSICK.

(10 California, 538. Supreme Court, 1858.)

Deed—Condition construed—Escrow. Where White, in consideration of $1,500, conveyed an undivided interest in certain mining claims by deed, containing the following condition: "The said Beem shall pay to the said White all the dividends that shall at any and all times be declared to one twelfth of said claims, also all the proceeds of his wages due him for labor in said claims, after receiving $10 per week for his own support, until the amount paid shall equal the sum of $1,500, with

interest mentioned above; then this bill of sale shall be given unto the said Beem by him who may have it in possession, thereby giving unto the said Beem full possession and control of said property,"

Held, that Beem was bound to contribute his labor on the claims until his labor (less $10 per week reserved) and the proceeds of the claim equaled the price to be paid.

Held further, that the deed was but an escrow in the hands of McKusick, the holder, and B. was entitled to nothing more than delivery of it: and was only entitled to this on strict compliance with the stipulations of the contract on his part.

Appeal from the District Court of Placer County, Eleventh Judicial District.

Action to recover possession of an undivided interest in sundry mining claims. Plaintiff had judgment and defendant appealed.

TUTTLE & HILLYER, for appellant.

B. F. MYERS, for respondent.

BALDWIN, J., delivered the opinion of the court—TERRY, C. J., and FIELD, J., concurring.

Some serious difficulties of a technical character, stand in the way of the recovery of the plaintiff below upon his own statement of his case; but as we are desired to pass upon the merits, we waive an examination of mere matters of remedy.

The basis of the plaintiff's (respondent's) claim, is the following instrument, and an alleged performance of its terms:

"Know all men by these presents, that I, Emmons White, of Grizzly Flat, Placer County, State of California, of the first part, for and in consideration of the sum of fifteen hundred dollars, to be paid to me in the manner hereafter described in or accompanying this bill of sale, by J. Beem, of Grizzly Flat, Placer County, State of California, of the second part, have bargained and sold, and do by these presents grant and convey, unto the party of the second part, one twelfth of fourteen claims situated on Grizzly Flat, Placer County, State of California, and known as the Clinton Company's claim; also, one twelfth of all the tools, cars, and appurtenances belonging unto said claims: to have and hold the same unto said party of the second part, his heirs, etc., forever.

"And I do, for myself, my heirs, etc., covenant and agree to and with the said party of the second part, his heirs, etc., to warrant and defend the sale of said property hereby made unto said party of the second part, his heirs, etc., against all and every person and persons forever.

"In witness whereof, I have hereunto set my hand and seal this the twenty-third day of June, one thousand eight hundred and fifty-six. EMMONS WHITE, [L. S.]

"Signed, sealed, and delivered in the presence of H. J. McKusick.

"Now the condition of this bill of sale, written on the opposite side of this paper, is such that if the said J. Beem shall well and truly pay unto the said Emmons White, his agent, attorney, or assignee, the sum of fifteen hundred dollars mentioned in this bill of sale, with interest at one per cent. per month from the date of said bill of sale, in the following manner here discribed, viz.:

"The said J. Beem, of the second part, shall pay to the said Emmons White, of the first part, all the dividend that shall, at any and all times, be declared to one twelfth of said claims; also, all the proceeds of his wages due him for labor in said claims, after reserving ten dollars per month for his own support, until the amount paid shall equal the sum of fifteen hundred dollars, with interest as mentioned above—then this bill of sale shall be given unto the said J. Beem by him who may have it in possession, thereby giving unto the said J. Beem full possession and control of said property mentioned in this bill of sale.

"In witness whereof, we have hereunto set my [our] hand and seal this the twenty-third day of June, one thousand eight hundred and fifty-six. EMMONS WHITE, [L. S.]

J. BEEM. [L. S.]

"Signed, sealed, and delivered in the presence of H. J. McKusick."

The plaintiff worked for only a short time on the claim, entitling himself to a credit of some twenty-four dollars, paid from his wages, and abandoned further work on the claim, nor did he work elsewhere and pay his wages (less the amount to be reserved, $10 per month,) toward the liquidation of the $1,500. But the claims were worked by the parties in pos-

session of the claim, and the proceeds coming to the share transferred, amounted to more than $1,500. No delivery was made of the paper by the custodian therein named. The claim was sold to McKusick, the holder of the paper, subsequently.

There was some evidence of a demand on the plaintiff to work, and notice of a rescission of this agreement, prior to the sale to McKusick. But it is unnecessary to consider this point in the view we have taken of the case.

The deed or bill of sale was but an escrow in the hands of McKusick, and the plaintiff was entitled to nothing more than a delivery of it—the deed taking effect from the delivery—and was only entitled to this on a strict compliance with the stipulations of the contract on his part. The question arises, what were these? It is contended by the respondent's counsel that he was not bound to contribute his labor on this claim at all; that the proceeds of his labor were but one means of paying the purchase-money, and if it was paid in any other way, it was well enough. But we can not think so. We think this agreement contains conclusive evidence of a contrary understanding. If all that was meant by this elaborate provision of the modes of payment was that the claim should be paid for generally, or out of the dividends of this share of the stock whensoever they should be received, and when so paid, the deed should take effect, why say anything about the labor or wages of the plaintiff? The contract—a very silly one—would be complete, according to this view of it, by a few simple words, declaring that White had sold to Beem his claim, and warranted the title. Beem was not to pay anything, except out of the claim, but the claim should pay for itself; in other words, White should give Beem the claim, if it was worth anything; for no limitation seems affixed to the period when the claim is to be paid for. The words, then, "the said Beem shall pay the said White all the proceeds of his wages and hire *for labor in said claims* after reserving ten dollars per week for his own support *until* the amount paid shall, together with the dividends, etc., equal the sum of $1,500, with interest," can only be considered as a covenant by Beem with White to work on the claims until his labor (less the $10 per week reserved,) and the proceeds of the share equaled the price to be

paid. And so Beem seems to have considered; for he entered on the work and worked for some weeks, appropriating, in this way, the proceeds of his labor. Courts will always give a reasonable interpretation to contracts when the words justify it. Here, they compel it. For the labor—or the wages for it—on the claims was to be continuous *until* those wages, together with the dividends, made up the price. The reason is just as plain. White did not go through all this elaborate, though not very artistic composition, for the purpose of making a present of his share to Beem, and warranting the title for nothing. He seems throughout to have been especially studious of his own interest, though somewhat awkward in this experiment at conveyancing. He was willing to sell, on certain terms, on credit to Beem; but he desired Beem to risk something, too. The claims were not worth anything unless worked: Beem was to put in his labor; White was to risk the claim. If the claim was worth nothing, White would get nothing, and Beem would lose his labor or wages. If it was valuable, Beem could get it by putting in his labor and getting the proceeds or dividends of the claim. It is true, it happened that the dividends of the share alone were sufficient to pay the $1,500, but if Beem had put in his wages, White could have got his money sooner. But as he did not choose to take the risk, he can not be permitted to take the profit. Whether White is injured or not, is immaterial; that was the bargain, and that the only condition whereby Beem could acquire title. He has not complied, but refused to comply, and White had a right to hold the contract void. McKusick occupied as good, but no better position than White. But that is sufficient to enable him to defeat this action.

The judgment is reversed.

SHAVER v. THE BEAR RIVER AND AUBURN WATER AND MINING COMPANY.

(10 California, 396. Supreme Court, 1858.)

Agent's purchase ratified by corporation. N., the president and managing agent of the B. R. Co., purchased of plaintiff and Sharp, in the

name and for the use of the company, a house, which was intended to be used by the company as an office, and for other purposes. He paid $500 cash and gave a mortgage on the premises to secure the balance of the purchase money. N. had been in the habit of making such contracts as he deemed necessary for the company. The trustees of the company held several meetings in the house, and some six weeks after the purchase a resolution was offered, declaring the purchase legal and valid, but was rejected. Upon suit to foreclose the mortgage; *Held*, that N. had authority to make the contract to bind the corporation, and that if the authority were doubtful, the acts of the corporation amounted to a ratification of it.

Married woman's contract void. After the rejection of the resolution N. made arrangements with a married woman to purchase the premises, and thereupon she paid $500, which was credited on the mortgage with the consent and approbation of plaintiff. *Held*, that the agreement was void, because the married woman had no capacity to contract, and the agreement to release the company and accept her as the purchaser was void for want of consideration.

Appeal from the District Court of the Eleventh Judicial District, County of Placer.

This was an action to recover of the defendants, a corporation under the name of "The Bear River and Auburn Water and Mining Company," a judgment for $2,000 and interest, and for a foreclosure of a mortgage.

The material facts, disclosed by the record, are, that one Nixon, who was president and managing agent of the Bear River Company, purchased of plaintiff and one Sharp, in the name and for the use of the company, a house, which was intended to be used as an office for the company, and a boarding-house for the laborers employed in constructing their ditch.

The price agreed on was $3,000, to secure the payment of which Nixon executed a mortgage, in the name and under the seal of the company. He then, as agent of defendants, took possession under the purchase, paid five hundred dollars of the purchase money, put a tenant in charge of the premises, and several meetings of the trustees of the company were held in the house. Some six weeks after the purchase, it appears from an entry in the books of the company, a resolution, declaring the contract legal and valid, was offered and rejected. Before this, Nixon had been, by resolution, vested with discretionary power as to "all matters appertaining to the pros-

ecution of the project of the company." He had been in the habit of making such contracts as he deemed necessary for the good of the company, and the contract with plaintiff is the only one defendants attempted to reject or repudiate.

Some time after the rejection of this resolution, an arrangement was made between Nixon and the tenant in possession, who was a married woman, by which the tenant agreed to pay the purchase money due by the terms of the contract, and take a conveyance of the land. Plaintiff was informed of this agreement, and expressed himself satisfied with it. Five hundred dollars were paid by the tenant, pursuant to this arrangement, which payment was credited on the mortgage. Soon after this, the premises were destroyed by fire. Before the institution of this suit, Sharp assigned his interest in the demand to the plaintiff.

The case was tried without a jury. The defendants had judgment, and the plaintiffs appealed.

SMITH & HARDY, for appellants.

CROCKER & ROBINSON, for respondents.

TERRY, C. J., after stating the facts, delivered the opinion of the court—FIELD, J., concurring.

The first question presented is as to the capacity of defendants to enter into the contract. By the law under which they were incorporated, defendants are authorized to purchase and hold "such real and personal property as may be necessary to enable the company to carry on their operations."

It is contended by respondents that the property in question was not necessary to the operations of defendants, and for this reason the contract was without authority, and void. But upon this point there appears to be no evidence, and the law presumes in favor of the validity of contracts.

Besides, it does not follow because an agent purchases property which is not absolutely necessary for the purposes of the company, that the latter can, after receiving the property, avoid the payment of the purchase money. This question arose in the case of *Moss* v. *The Rossie Mining Company*, 5 Hill, 137; COWEN, Justice, in delivering the opinion of

the court, said: "I am not aware that a corporation, more than another, can purchase and convert an article to its own use, and then object that it acted beyond the statute power. It is itself a sort of agent, and must be the judge as between itself and the vendor whether the article be wanted or not. The vendor can not pronounce on the question. * * * * Purchasing a shop for the purpose of keeping goods and carrying on trade is objected to. But is the loss to fall on the grantors of the shop, or the vendors of the goods? The goods to be purchased, for aught Moss and Knapp knew, might be wanted by the workmen of the company, in payment for labor, and been even more acceptable than cash."

This authority applies directly to the case before us. It was certainly necessary that defendants should have an office in which to keep the papers and books of the corporation, and which would serve as a place of meeting for the trustees, and it was probably thought advantageous to the defendants to have a place at which the hands employed by them could be boarded. Considerable stress is laid by the respondent on the fact that the house purchased was a hotel, and it is said "it was certainly no part of the objects of the corporation to embark in hotel keeping." It is true, the house is called in the conveyance the "Empire Hotel," but the description of it in the evidence, as well as the price for which it was sold, raise a strong presumption that it was susceptible of being put to other uses.

The authority of Nixon to make the contract, as the agent of the company, we think, sufficiently appears; and if this point were doubtful, the acts of the company amounted to a ratification. Nixon, as agent of the defendants, entered into possession immediately after the purchase; the trustees held their meetings in the house, and nothing is said as to his want of authority till some six weeks afterward, when at a meeting held on the premises, the resolution approving the contract was offered and rejected.

The entry of this resolution comes in a very questionable shape, and is entitled to but little weight, as it contains erasures and interlineations which materially vary its meaning, and is, at least, a very singular mode of repudiating a contract.

It would have been more in accordance with correct notions of propriety and justice, if a resolution refusing to accept the contract had been *passed*, accompanied by an offer to cancel the deed, which had not been recorded, and return the property of which they were in possession.

The arrangement between Nixon and the tenant was void, because the tenant, being a married woman, had no capacity to contract, and any agreement on the part of plaintiff to accept her as purchaser, and release the company, was void for want of consideration.

The objection to the parol proof of the existence of the debt intended to be secured by the mortgage, is answered by the decision of this court in *Bennett* v. *Solomon*, 6 Cal. 134.

There is no doubt that the mortgage itself, being in contravention of law, is void, but it is not perceived that this fact invalidates the debt it was intended to secure: *Sherwood* v. *Dunbar*, 6 Cal. 53.

Our conclusion from the record is, that plaintiff is entitled to recover from the defendants the sum of $2,000, with legal interest from the time when the several payments became due under the contracts.

Judgment reversed and cause remanded, with directions that the court below enter a judgment in conformity with this opinion.

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[1] MYERS v. SOUTH FEATHER RIVER WATER COMPANY.

(10 California, 579. Supreme Court, 1858.)

Status of assignor, to the contract, after assignment. Plaintiff entered into a written contract with defendant to dig a ditch, he to be paid therefor in money, or part in water and part in money. He assigned this contract to L. & Co. to secure a debt, and authorized them to receive the payments. Plaintiff afterward demanded payment in water, which defendant refused to make, without giving any reason for the refusal. *Held*, that plaintiff, having assigned the contract, was not the party to make the demand, and that defendant had a right to refuse payment without stating any reason therefor.

Demand in cases of election. When there is an election to be made as to the thing to be received in payment, there must always be a demand.

[1] S. C. on second appeal, 14 Cal. 268; *Post* DITCH.

Effect of assignment of contract, as collateral. Where an assignment of a contract as collateral security, operating by its terms a change of ownership of the subject-matter, has been made, the title is supposed in law to remain divested until it be shown that the condition of the defeasance has happened, as in the case of a chattel mortgage.

Appeal from the District Court of the Fifteenth Judicial District.

Plaintiff had judgment in the court below for the sum of $24,775.11, from which the defendants appealed to this court. The facts of the case appear in the opinion of the court.

MESICK & SWEZY, for appellants.

BALDWIN, J., delivered the opinion of the court—TERRY, C. J., concurring.

We are saved the necessity of investigating the multitude of points upon which the ingenuity of counsel has exhausted itself, as in our opinion, a single objection taken by the appellant is conclusive, and requires the reversal of the judgment below.

The plaintiff brought this suit upon a contract made by him and the appellant, whereby the plaintiff agreed to dig for the company a certain line of ditch, which is particularly described, of given dimensions, and to be constructed in a given manner. In consideration of this, the respondent contracted to pay the plaintiff the sum of three dollars per rod of the excavation, at the office of the company at Forbestown—thirty-three and one third per cent. on the completion of each mile, in cash, of its value, estimated at three dollars per rod; the remaining sixty-six and two thirds per cent. at two dollars per rod to be paid in water at the rate of twenty-five cents per square inch, delivered through an orifice under six inches of pressure, anywhere along and at the main ditch. The contract proceeds:

"It is further agreed, between the parties contracting, that the parties of the second part shall reserve the right to pay the value of the excavation, or three dollars per rod, in cash, and also the right to appoint such agent, or agents, to manage the sale of water and other matters of the company, as they, the parties of the second part, may deem best for the interests

they represent. The parties of the second part agree to pay to the party of the first part the actual first cost of all the flumes the party of the first part may construct upon the line of the main ditch in the proportions of cash and water as before specified for the excavation, viz.: one third in cash and two thirds in water, or, at the option of the parties of the second part, the whole amount in cash; the water to be estimated, measured and delivered as before specified for the excavation, under a pressure of six inches.

"The party of the first part further agrees to present true and accurate vouchers and accounts of all cost of said flumes at each time of payment.

"The parties of the second part agree to sell to the party of the first part all the water the party of the first part may desire, that may run in said ditch, at the rate of twenty-five cents per square inch, and measured, as before specified, under a pressure of six inches, until the party of the first part is fully paid, according to the terms of this contract, for the work herein contracted for, and the party of the first part hereby agrees and binds himself to sell no water to any person or persons for a less amount than fifty cents per square inch, measured as before specified, under a pressure of six inches. The parties of the second part agree to pay to the parties of the first part the proceeds of all water sold by the agent, or agents, of the company, out of said ditch, until the party of the first part shall be fully paid for the construction of said ditch, according to the terms of this contract. All branch ditches shall be the property of the South Feather Water Company, upon the full payment of the terms specified herein, without further cost to the company.

"The party of the first part further agrees and binds himself not to extend, or cause to be extended, the main ditch to any place or in any manner without the consent of the company, and a special contract to that effect. And the party of the first part further agrees and binds himself not to do or cause to be done anything that may be detrimental to the interest of the company.

"The party of the first part agrees to pay twenty-five cents per square inch for all and every first sales of water, anywhere along the lines of said ditch, or between its terminus and

Feather River, until the terms of this contract are fulfilled."

The complaint, after charging that the work was executed according to the contract, avers that on the 12th day of April, 1856, there remained due in cash on the contract $1,134.66, and $8,125.34, payable in water, at twenty-five cents per inch, as by the terms of the contract; and the plaintiff avers that on the — day of December, 1856, he demanded of the defendant, at the office of the defendant, the sums due in money and in water, which demand was refused, and that the value of the water at the time it was due and payable was worth one dollar per inch. The complaint claims the sum of $29,084.56, with interest from the 26th of December, the date of demand and refusal.

The defendant, in his answer, among various other matters, set up for a separate defense, as follows:

"And these defendants, in further answer to said complaint, and in defense to this action, aver that the said plaintiff, on the said thirtieth day of January, A. D. 1856, in order to secure his indebtedness at the time to the said copartnership of J. R. Lumbert & Co., and as security for the performance of the contract with said partnership aforesaid, transferred and conveyed his whole and entire interest in his contract with these defendants, first above mentioned, to the said J. R. Lumbert & Co., and authorized and empowered said copartnership to collect all payments that might fall due to him, from time to time, on the said contract; and to have and exercise all the rights and powers in the collection of water-rates, after the completion of said ditch, which the said plaintiff possessed thereunder, which instrument of transfer is indorsed upon the contract between the plaintiff and these defendants, and is in the words and figures following, to wit:

"'NATCHEZ, BUTTE COUNTY, CAL.,

"'January 30, 1856.

"'In consideration of my present indebtedness unto Messrs. J. R. Lumbert & Co., and an agreement or memorandum made and entered into this day, by them and myself, I do hereby transfer and convey my whole and entire interest in the within contract unto the said Lumbert & Co., or their assigns, with full power to collect all payments that shall fall due, from time to time, on the within contract; and in the

collection of water-rates, after the completion of the ditch, they are to have all the rights and powers that the contract guarantees to the first party, until the said Lumbert & Co., or their assigns, are well and fully paid.

"'Witness: E. BARRELL. H. K. MYERS.'

"And these defendants, in further answer to said complaint, and in defense to this action, aver that the said firm of J. R. Lumbert & Co., afterward, and on or about the first day of February, A. D. 1856, gave these defendants notice of their said agreement with the plaintiff, and of his transfer to them of his interest in his contract with these defendants; and these defendants accordingly paid to said J. R. Lumbert & Co., upon said contract transferred to them, on account of the plaintiff, on the twenty-eighth day of March, A. D. 1856, the sum of one thousand dollars, and on the ninth day of January, A. D. 1857, the further sum of five thousand seven hundred and ninety-five dollars and five cents, in payment of the balance due on the first day of November, one thousand eight hundred and fifty-six, by the plaintiff to the said J. R. Lumbert & Co., for moneys advanced and goods furnished, pursuant to the contract aforesaid between them, and upon the indebtedness from him, to them, referred to in said contract, and for the security of which the transfer of the original contract between the said plaintiff and defendant was made by the plaintiff to J. R. Lumbert & Co., as above mentioned, and which balance these defendants had agreed to pay to said J. R. Lumbert & Co., on the said first day of November, 1856."

The case was tried by the court, and its findings appear in the record. Among them is this: that the plaintiff alleges that the water was worth one dollar an inch, which is not denied, and is found as fact.

It will be seen that the title of the plaintiff to the recovery for the value of the water accrues from the demand made for it; for whether election to take the water or the money be in plaintiff or defendant, it is necessary to make a demand in such cases as this, to determine or to notify the election; or, even it this were not so, yet, as the standard of recovery, in this case, is alleged and adjudged to be the value of the water *when demanded*, and the court predicates its finding upon the value at that time, it is necessary that such demand should be

legally made, and by some one having authority to make it.

It does not follow, by any means, nor could the court judicially know, that any article—much less water, contracted for at twenty-five cents per inch, and proved on a certain day, or at certain times, to be worth a dollar an inch—is always, or is at any other time than that proved, worth the sum proved at the given time.

The demand by the party entitled, in such cases as this, puts the other party in default, but in this case it also establishes the measure of damages for the default.

The demand was made, it seems, by the plaintiff, *in December*, 1856; the sums due became liquidated in April, 1856; the assignment to Lumbert & Co. was made on the 30th of January, 1856. This assignment transferred all the right, title, and interest of the plaintiff to Lumbert & Co., who from thenceforward had all the benefits of that contract, until, at least, the sums of money provided for in the agreement were fully paid. Of this assignment, the defendant had notice shortly after its execution.

It is true that Lumbert & Co., in January, 1857, transferred this agreement to the defendant; and even it might, for the argument, be conceded that they had no right so to do—at least, that they could not, by the transfer, place the defendant in any better situation in respect to the subject of the contract than the assignors occupied; but this transfer was not made until *after* the demand alleged. Nor was the effect of it to give to the *plaintiff* any greater rights than he held before.

There is no evidence, that we can see, and no finding of the court, that, at the time of this demand, the debts secured by the assigned contract to Lumbert & Co. were paid off; indeed, it is not possible to understand, from the papers, the exact sums due, or which were intended to be secured by this agreement.

The assignment of plaintiff to Lumbert & Co., operating by its terms a present and effectual change of ownership in the subject-matter, the title is supposed in law to remain divested until it be affirmatively shown that the condition of defeasance has happened. It is not unlike a chattel mortgage, which conveys the thing mortgaged, with power to collect

hires and to use the chattel until the money secured thereby is paid; and, until payment is proved, all the right of the mortgagor to the mortgaged property passes to the mortgagee.

If the defendant had paid to the plaintiff, after notice of this transfer, it is clear it would have paid in its own wrong, and might have been compelled to pay to Lumbert & Co. The defendant, certainly, is in no default for not paying to plaintiff when and what he was under no obligation to pay. The plaintiff, on the facts stated, had no right to make the demand, and, from anything that appears, it would have been a fraud in him if he had received the money or water demanded. The defendant refused the demand, without assigning any reason; nor was it bound to assign any.

It is said that this defense was taken in argument, for the first time in this court. This may be. But it is a defense which is directly and clearly set up in the answer. It may be true that, following the averment of the fact of assignment, are some allegations of partial payment to the assignees. But we apprehend this makes no difference. If A is sued by B on a promissory note, and he sets up in his answer that B sued him on the note and obtained judgment, and further, that he paid a part of the judgment, we presume (especially if no demurrer be interposed for duplicity) that the plea of judgment recovered would not be less effectual, because associated with the unnecessary fact of payment of the judgment, or in part. The latter portion of this answer may be regarded as surplusage, without at all impairing the force of the matter first stated—which, as we have shown, defeats the recovery as it appears of record.

Judgment reversed, and cause remanded.

[FIELD, J., having been counsel in the court below, did not sit in the case.]

CHALFANT v. WILLIAMS ET AL.

(35 Pa. St. 212. Supreme Court, 1860.)

Sale of colliery—Parol evidence. In an action on a contract for the sale of a colliery for a gross sum of money, to be paid at a certain rate per ton on the first coal mined therefrom, until the full consideration was paid, parol evidence is admissible to prove that at the time of the execution of the contract it was agreed between the parties that the vendees should not be bound to mine the necessary amount of coal and that the vendor should take the risk of their doing so; the English rule that parol evidence is inadmissible to vary the legal operation of an instrument does not obtain in Pennsylvania.

Error to the Common Pleas of Schuylkill County.

This was an attachment execution issued on a judgment in favor of Hibbert Chalfant against John Odgers, and served on Roderick R. Williams and others trading as Edward Davis & Co., as garnishees. The garnishees pleaded "*nulla bona.*"

On the trial the plaintiff gave in evidence the following agreement between the defendant and the garnishees, and claimed that under it there was due to the defendant from the garnishees the sum of $1,681.20.

"Agreement made and concluded the 20th day of September, A. D. 1854, between John Odgers, of the township of Cass, in the county of Schuylkill and State of Pennsylvania, of the one part, and Edward Davis, Isaac Davis, Roderick R. Williams, Evan Jenkins, all of the borough of Minersville in said county, and Richard Lewis, of said township, of the other part, witnesseth: That the said John Odgers, in consideration of the following agreements, promises and stipulations on the part of the said parties of the second part, doth grant, bargain and sell to the said parties of the second part, all his right, title and interest in and to a certain coal lease from Daniel R. Bennett, agent for I. V. Williamson and R. C Dale, to him, the said Odgers, dated the 1st day of July, A. D. 1853, for and of that certain colliery on Wolf Creek in said township, known as the Diamond Slope, on the Diamond tract of land, together with the engines, pumping, hoisting apparatus, chain, coal breaker, screens, chutes and road and all fixtures and improvements in and

about the said colliery; the said Odgers hereby also grants, bargains and sells to the said parties of the second part, all the tools, goods, chattels, animals, and every other kind of personal property belonging to the said John Odgers, now in use at said colliery, except one bay horse, all coal now on the outside at said colliery, and two barrels of oil; and the said parties of the second part, in consideration of the aforesaid stipulations and agreements on the part of the said Odgers, do hereby promise and agree to pay the said John Odgers the sum of $4,000 in manner as follows, viz.: The sum of $600 at the signing of these presents, one promissory note drawn by the said parties of the second part to the order of the said John Odgers, payable in thirty days from date, for the sum of $216.62 and the balance as follows, viz.: the sum of fifty cents for each and every ton taken from said colliery from the date hereof until the sum of $815 is paid, and then the remainder of said consideration shall be paid at the rate of twenty-five cents for each and every ton so taken from said colliery; and it is hereby further agreed that the said John Odgers shall not receive any part or portion of the said fifty or twenty-five cents a ton as aforesaid until all mortgages and liens upon the property hereby sold by said John Odgers shall have been paid by said parties of the second part out of, by and from the said sums of fifty and twenty-five cents per ton as aforesaid. In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

"JOHN ODGERS, [L. S.]
"ISAAC DAVIS, [L. S.]
"RODERICK R. WILLIAMS, [L. S.]
"RICHARD LEWIS, [L. S.]
"EVAN JENKINS, [L. S.]
"EDWARD DAVIS, [L. S.]

"In presence of S. D. BALL."

The defendant, thereupon, under exception by the plaintiff, gave the following parol evidence as to what took place between the parties, at the execution of the agreement.

S. D. Ball, Esq. sworn: "I drew the articles of agreement for the parties, and drew them as I understood the agreement to be; it was rather hastily drawn; just before the agreement was signed, Mr. Williams spoke of the agreement with re-

gard to the fifty and twenty-five cents; he said his understanding was, that they were only to pay if they mined the coal; I think Mr. Odgers objected to that understanding; they talked over the matter, and it was finally agreed that there was no difficulty in mining that quantity of coal; Mr. Odgers finally said he would take the risk, that they would mine that quantity of coal; they were very anxious to have the colliery; it was thought to be a bargain; they refused to sign if they were bound to mine the coal; Mr. Odgers, as I understood it, took the risk upon himself. There was something said like this: 'How will it be, if you don't mine the coal? then, of course, you won't get the money.' Mr. Odgers finally agreed to take the risk."

Cross-examined.—"It seemed to be taken for granted that there was sufficient coal there; I don't remember the words that Williams used; he was particularly anxious that the agreement should show that the price was to be paid out of the coal as mined; I don't know that I made up my mind as to the exact extent of the risk that Odgers assumed; I had no idea in my mind that they would abandon it, except for want of coal; there was something said about cash purchases that Odgers had from Reading; I was at the colliery; don't know whether they got the personal property; think there was some complaint about a portion of the property, not much in amount; I don't remember the exact conversation that took place at the time of executing the agreement; there was a large sum of money misappropriated by one of the parties, say $1,000, which operated to destroy their confidence in each other; I think they recovered the money; I think they went out after that; I was counsel for Mr. Chalfant, and issued the attachment execution; I had several conversations with the parties, and, by arrangement, it was agreed that Chalfant should get his judgment against Odgers, and issue the attachment; all parties were willing that Chalfant should have the money that was coming to Odgers; at the time the judgment and attachment execution were issued, they were going all right, and it looked as if the money would be paid; I had several conversations with them; proposed their acceptance of an order; Mr. Odgers said he would take the risk that they would mine the necessary amount of coal; they objected to

sign the agreement if they were absolutely bound to mine the coal; they were willing to pay as they mined the coal according to the agreement; Mr. Odgers agreed to take the risk that they would mine the coal; my understanding was, that if any accident happened, so that they could not mine the coal, they were not to pay; they objected to signing if they were bound to mine the coal; it was to be at their option; there was something said about re-writing the agreement, but they said it was not necessary; that they understood it, and it would be all right."

The plaintiff objected to the testimony of Mr. Ball on the ground that it went to vary and contradict the written agreement; but the court below (HEGINS, P. J.) overruled the objection, admitted the evidence, and sealed a bill of exceptions.

There was a verdict and judgment in favor of the garnishees; whereupon the plaintiff removed the cause to this court, and here assigned for error, the admission of the testimony of Mr. Ball.

R. M. PALMER and S. W. GEER, for the plaintiff in error.

H. FISHER, for the defendants in error.

The opinion of the court was delivered by WOODWARD, J.

The sole question on this record is, whether the testimony of Seymour D. Ball varied or contradicted anything contained in the agreement of 20th September, 1854, between John Odgers, of the one part, and the defendants, of the other part. It was an agreement whereby Odgers sold to the defendants a coal lease and fixtures which he held, in consideration whereof they were to pay him $4,000 in the following manner: $600 down, $216.62 in a note at thirty days, and fifty cents for each and every ton taken from said colliery until the sum of $815 was paid, and then the remainder of said consideration was to be paid at the rate of twenty-five cents for each and every ton so taken from said colliery.

Now, the fair and reasonable construction of this writing, standing alone, would be, perhaps, that the purchasers were to take out coal enough to pay, at these rates, the balance of the whole sum of $4,000; but there is no such covenant ex-

pressed, and the parol evidence of what occurred at the execution of the paper shows clearly that if such a covenant had been expressed the defendants would not have signed, and that Odgers agreed to take the risk that they would mine that quantity of coal.

It is manifest, therefore, that the parol evidence contradicts nothing expressed in the writing, but only an implication from what is written. If we had held to the rule that is laid down in Starkie's Evi., part 4, p. 1,009, that parol evidence is inadmissible for the purpose of altering the legal operation of an instrument, we should be obliged to reverse the ruling in this case; but we have got far away from that rule. We permit a deed absolute on its face to be proved a mortgage; we receive parol evidence to rebut a presumption or an equity—to supply deficiencies in the written agreement—to explain ambiguities in the subject-matter of writings—to prevent frauds, and to correct mistakes: *Bank* v. *Fordyce*, 9 Barr, 279; *Rearich* v. *Swinehart*, 1 Jones, 238; *Barnhart* v. *Riddle*, 5 Casey, 96; *Musselman* v. *Stoner*, 7 Casey, 270.

These cases, and others therein cited, indicate sufficiently the wide departure we have made from the common law on this vexed subject; and they show, too, that the rule, as it obtains in Pennsylvania, was not violated by the admission of the evidence in question.

The judgment is affirmed.

STRONG, J., was absent at Nisi Prius.

BREWSTER v. LATHROP.

(15 California, 21. Supreme Court, 1860.)

Sale of mining stock—Dividends—Parol proof to explain. On September 22d, B. sold to L. two shares of mining stock, with all dividends made after the morning of the 23d of September. Both parties expected a dividend would be declared on the 22d, but the trustees did not in fact declare it until afternoon of the 23d, and it was paid to L. Upon suit brought by B. to recover the amount of the dividends it was *held*, that parol evidence was properly admitted to explain the transaction and point its true meaning.

Appeal from the Fifteenth District.

Action to recover $1,440, the amount claimed to be due to plaintiff as dividends upon two shares of mining stock sold by him to the defendant. The complaint alleged that at the time of the sale it was understood by both parties that plaintiff was to have the money in the treasury of the mining company, subject to dividend upon the two shares of stock sold, and that at that time there was in the treasury, $720 per share, and that defendant fraudulently induced the trustees to declare a dividend of only $400 per share. The $400 dividend was paid by the company to the defendant.

The court below allowed the plaintiff to prove the meaning of the assignment on the question of dividends, by conversations had with the defendant.

The case was tried by the court, and judgment rendered for the plaintiff for $800 with interest. Defendant appealed.

BURT & RHODES, for appellants.

ROBINSON, BEATTY & HEACOCK, for respondent.

BALDWIN, J., delivered the opinion of the court—FIELD, C. J., and COPE, J., concurring.

On the 22d day of September, 1856, the plaintiff was the owner of two shares in the capital stock of the Ohio Mining Company, on which day he assigned them to defendant, by indorsing on each of the two certificates as follows:

"I hereby assign, transfer and set over, all my interest in the within share of stock to H. B. Lathrop, and authorize the transfer to him, with all the dividends made after the morning of the twenty-third of September.

(Signed) "H. BREWSTER."

It was in proof that the shares sold were in a mining company which was then at work in the river, taking out large amounts of gold dust therefrom; and it was expected that a dividend would be declared on Monday morning, the twenty-second of September. It had been usual to declare dividends on Sunday. On Sunday, one of the directors told plaintiff he thought a dividend would be declared the next

day. Both parties lived in the neighborhood. On Tuesday forenoon the defendant went to the office of the company, to have the shares transferred on its books. Defendant inquired of some of the trustees, whose duty it was to declare dividends, if the dividend had yet been declared. On being told that it had not, defendant said it would be an accommodation to him if it was not declared until the afternoon. At this time, some of the trustees were on the claim of the company, and others on other parts of the work or buildings of the company, some three or four hundred yards apart. One of the trustees told defendant that a dividend would be made when other trustees came up from the claim at noon. A dividend was, in fact, made between twelve and one o'clock of that day, the twenty-third, of four hundred dollars to the share. This was paid to the defendant by the company, and an order from the trustees to the treasurer given, to pay the money to defendant. After this statement, the learned judge below proceeds: "I think it clear that the shares of stock were transferred with the view that the money then in the treasurer's hands should belong to the plaintiff. Both expected a dividend would be made on Monday, and the time was evidently extended to the twenty-third, Tuesday, to cover any delay of the trustees in declaring it. With this understanding of the parties, a delay of less than one hour can not defeat plaintiff's rights to the dividends then made." And we are of the same opinion. It would be sacrificing the spirit of this contract to its letter, to hold that this delay of the trustees for this brief space defeated the plaintiff's rights, even if there was no reason to believe, as there is, that the defendant's own interfering produced or contributed to this result.

We have no doubt parol evidence was properly admitted to explain the transaction, and point its true meaning. See 2 Pars. on Cont. 72, *et seq.*

Judgment affirmed.

FITCH v. ARCHIBALD.

(29 New Jersey Law, 160. Supreme Court, 1861.)

Rule as to affirming report of referee. If the report of a referee be unsupported by the evidence before him, or if the referee must have contravened some rule of law in reaching his conclusion, the report should be set aside: but if it is not against the evidence in the case, and no rule of law has been violated, it should stand.

[1]**Referee's report equivalent to verdict.** The report of a referee is entitled to the same weight as the verdict of a jury upon the facts of the case.

Receipt of goods, knowing the quality. If the purchaser of goods with full knowledge of their condition, voluntarily receive them from a ship and pays the duties on them, he can not afterward set up the fact that the goods were not of a merchantable quality.

Facts of the case. F. agreed in writing to take of A. all the barytes he might deliver at Jersey City during that season, and pay therefor $12 per ton: *Held*, that under the agreement F. was entitled to have a merchantable article, and parol evidence could not be given to show that any particular lot or quality of barytes was intended.

Parol evidence to prove quality. Where there is any doubt about the identity of the article agreed for, parol evidence may be given to identify it; but where the agreement is for a known article of merchandise, parol evidence is not admissible to show that it was to be of a certain kind or quality.

Deduction of duties from purchase money. When merchandise is sold to be delivered at a particular place free of charge, the vendee may pay any government duties required to be paid before delivery, and deduct the same from the purchase money.

On rule to set aside report of referee.

Argued before WHELPLEY, Chief Justice, and Justices OGDEN and VAN DYKE.

BRADLEY, for plaintiff.

I. W. SCUDDER, and WILLIAMSON, for defendant.

WHELPLEY, C. J.

If the report is unsupported by the evidence before the referee, or if the referee must have contravened some rule of law in reaching his conclusion, the report should be set aside. But if the report be not against the evidence in the

[1]Approved, *Excelsior Co.* v. *Potts*, 36 N. J. L. 302.

cause, and no rule of law has been violated, it ought to stand.

The report is entitled to the same weight as the verdict of a jury upon the facts involved in the case.

The action was for the price of 150 tons of barytes, sold and delivered by the plaintiff to the defendant at $12 per ton.

The plaintiff gave credit for the freight paid by defendant, $450, and for cash on account $600, claiming a balance of $750 and interest from November, 1856, at seven per cent. The referee allowed $750, with interest from 15th November, 1856, at seven per cent., $155.32, making in all $905.32.

Archibald was the owner of a mine of barytes situate in Nova Scotia, near the Bay of Fundy. During the summer of 1856 he had lying on the shores of that bay a large heap of the barytes, which had remained subject to the flow of the tides for a long time, by which it had become mixed with sand, and the mud and slime left by the tides, so as seriously to injure, if not destroy, its marketable value. The use to which the mineral was to be applied was the adulteration of paints, by mixing with them the mineral ground to an impalpable powder, which in that state was white.

Fitch, in connection with other parties, had rented works at Jersey City, for the purpose of grinding the mineral, at great expense, and was in great need of the mineral to put the works in operation. It was insisted on the part of the plaintiff, and evidence given to sustain this insistment, that the parties met in New York during the summer of 1856, and negotiated concerning a sale of the mines; that Fitch wanted barytes immediately; that Archibald informed him he had suspended working the mines and could not get out any of the mineral that season; that if what he had on hand would answer, he was ready to ship it at $12 a ton, also paying the freight; that Archibald suggested that Fitch should send some one to examine the property; that Fitch agreed to send one Keenan, who was in his employ, and said that if he approved of it he wanted it shipped immediately, as he was anxious to commence operations that winter; that Keenan went to Nova Scotia, saw the barytes on the shore in the state described, said it would do very well, and wanted it shipped

immediately, saying it could be washed at Jersey City; that Keenan returned to New York, reported to Fitch, and that afterward on the 27th September, 1856, Fitch signed an agreement as follows: It is agreed between C. D. Archibald and A. J. Fitch, of Jersey City, as follows: The said Fitch agrees to take all the barytes the said Archibald may deliver at Jersey City during the present season, and to pay therefor the price of twelve dollars per ton *ex* ship; the vessel or vessels to be free of wharfage and dockage during delivery; to be paid in cash on delivery of the several cargoes. The barytes was shipped by Archibald and delivered at Jersey City to Fitch, who received it, and paid the duties upon it, because, he says, the government insisted on his taking it. He says he tried to refuse taking it on account of its dirty state.

The defendant insisted that he was ignorant of the state of the article when he signed the agreement; that Keenan was not his agent, and had no power to agree to take the barytes, and never did agree to take it on his behalf; that Archibald sent him a sample of the article; that the barytes was to be as good as the sample; that after the barytes arrived he sent word to Archibald that it was worthless; that the barytes was of no value.

There was evidence to support the plaintiff's version of the facts, and also that of the defendant, both documentary and oral.

Keenan was there and examined the barytes, and brought a sample from the shore; and after his return the written contract was signed. On the 22d September, four days before the agreement was signed, and after Keenan's return and his report to Fitch, Fitch wrote a letter to Archibald, in which he said: "Your favor of the 11th was received, and in answer, I want your barytes you have on hand. If we can make an arrangement on as favorable terms with you as we can with others, we will give you the preference. If you come to New York I will call and see you." I do not intend to examine the evidence in the cause in detail, nor do I think it at all necessary for the decision of the case to do so.

The evidence in the case justified the referee in finding—

1. That Fitch, at the time he made the written contract,

knew the state in which the barytes on hand was; that it was dirty; unfit to be shipped; that he relied on being able to wash it at Jersey City.

2. That he did not buy it by sample.

3. That Keenan was the agent of Fitch sent to Nova Scotia to examine the mines and the barytes on hand, and to determine whether it was fit for the purpose of manufacture.

4. That Keenan pronounced it a merchantable article, and agreed that Fitch should receive it as such.

5. That the agreement was made with reference to the heap of barytes on the shore in its then state.

6. That Fitch received the barytes under the agreement, and paid the duties upon it voluntarily, for the purpose of enabling it to be delivered on the wharf at Jersey City.

There is a conflict of evidence upon these points; but I can not say that the finding is so far unsupported by the testimony as to justify the court in setting it aside, even if it were necessary to support the report by an affirmative finding on all the points.

The defendant insisted that, by the terms of the agreement, the plaintiff was bound to deliver a merchantable article, and that the barytes delivered was not such; and also, that he was entitled, under the contract, to have the moneys paid for duties, refunded under his set-off filed in the case.

By the defendant's own admission he was fully aware of the condition of the article before he paid the duties upon it and permitted it to be landed. If he paid the duties on account of plaintiff, and with full knowledge of the situation of the barytes, permitted it to be landed, he ought not now to be permitted to say that it was not merchantable.

But did the agreement require the delivery of a merchantable article? Is that its import as it stands? The writing may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties. No other evidence of the language employed by the parties than that used in the instrument is receivable: 1 Greenleaf 277; 2 Cowen & Hill's Notes to Phillips' Ev., note 263 to page 293.

Where the writing does not clearly identify the subject of the agreement, surrounding circumstances may be resorted

to, to show what the parties referred to in the agreement; but where the contract is executory, requiring the delivery, not of a certain article capable of identification from all others of the same kind, but of a certain or uncertain quantity of a known article of merchandise, parol evidence is not admissible to show that this quantity is to be taken from a larger quantity of the article of a certain kind, the property of a certain person or of a particular quality. To receive such evidence, or permit its application for such a purpose, would be to alter the contract in a most material point.

The effect of an agreement to deliver or receive 150 tons of barytes, is that the barytes must be of a merchantable quality. If it is not such, the vendee is not bound to receive it.

It will be perceived that the question would be, not whether the agreement should be void for an uncertainty or apply to a certain article of merchandise, but whether the merchandise should be of a certain quality or not; in short, not a difficulty about identity, but quality. It would be neither a case of patent or latent ambiguity, the agreement being certain on its face and parol evidence creating no ambiguity: *Smith* v. *Jeffries*, 15 Mees. & Wels. 561.

That was an agreement to sell 60 tons of Ware potatoes at five pounds per ton; it was held that it could not be shown that the plaintiff had in fact contracted for a particular kind of Ware potatoes, to wit, Regents, to arrive. If the defendant had refused to receive the barytes because it was not in a merchantable state, if it was in fact so, he might have successfully defended himself against an action for damages, unless he had, as before stated, precluded himself from so doing by his conduct in regard to the article shipped: *Howard* v. *Hoey*, 23 Wend. 350.

In all agreements to make sales of indeterminate things there is always a warranty implied that the indeterminate thing to be delivered should not have any remarkable defect, or as it is sometimes said, should be merchantable. In such a case the maxim of the law is *caveat venditor;* in case of executed sales of a thing *in esse* it is *caveat emptor:* Smith's Mercantile Law 508; *Chanter* v. *Hopkins*, 4 Mees. & Wels. 399; *Moses* v. *Mead*, 1 Denio 378; *Beninger* v. *Corwin*, 4 Zab. 257.

The agreement, by its terms, required the delivery of a merchantable article, and parol evidence was incompetent to show that the barytes to be delivered was to be of an inferior quality.

The defendant in this case claimed the duties paid by him as a set-off. Whether he can recover these or not depends upon the agreement. It is insisted that the agreement to deliver the barytes at Jersey City at $12 per ton, the vessels to be free of wharfage and dockage during delivery, to be paid for in cash on delivery of the several cargoes, imposed upon Archibald the obligation to do everything, to pay all charges prior to delivery, while the property remained his. This is so. The duties, if any were demandable, were a charge on the barytes while it was the property of the plaintiff; without their payment he could not perform his contract.

The barytes were consigned to the defendant by the plaintiff; he supplied no funds with which to pay the duties; the consignment of them to the defendant was a request to pay them.

If the barytes had been consigned to defendant as a factor he might have pledged them for the payment of duties accruing on the goods: *Evans* v. *Potter*, 2 Gallison 12.

I am of opinion that the duties were a charge upon the plaintiff, and should have been allowed by the referee, and that for this reason the report should be set aside, unless the plaintiffs remit their amount with interest from the time of payment.

VAN DYKE, J.

This action was brought in this court, and after having been several times noticed for trial, it was, by consent, referred to Judge Nevius for his examination and report. The object of the action was to recover the value of 150 tons of barytes at the rate of $12 per ton. The referee reported in favor of the plaintiff for the whole of this claim, less the freight and less a payment of $600, which had been paid by the defendant on a draft drawn on him by the plaintiff, and accepted before the barytes was delivered.

Twelve dollars per ton seems to be the usual price for barytes of good quality and in merchantable condition, but the

article in question seems to have been very far from this. The plaintiff himself says it had been lying on the banks of the Bay of Fundy two or three years, and had been overflowed by the tide during that time; that it had become comminuted and dirty with the mud and slime which the tide carried over it. His witness, Morrison, says that it was muddy and sandy, and in such condition that he advised the plaintiff not to ship it at all, as it would injure the reputation of the mines, while Fitch himself, and Gordon and Tresdale, say it was in such condition as to be of no value at all, as it would cost more to cleanse it than it was worth. With such an article of barytes as this, nothing can justify the report which has been made in favor of the plaintiff but a clear and explicit agreement on the part of the defendant to take such barytes at such a price, with a full and perfect knowledge on his part of the character and condition of the article which he was purchasing. It is conceded that the defendant had never seen the article himself until it was delivered, although he had seen a sample which was in a perfect state and was satisfactory; and of all this the plaintiff was aware. It is very clear then, that the defendant, in person, never made any such agreement with a knowledge of the condition of the barytes, and the remaining question on this branch of the case is, whether he ever authorized any other person to make such a contract. It is insisted on behalf of the plaintiff, that the arrangement or agreement to ship the dirty barytes in question was made by Keenan, who, it is contended, was the agent of the defendant for this purpose; but the first difficulty in the way of this view of the case is, that the contract for the barytes, such as it was, was made by the defendant himself with the plaintiff in person, and was made at New York or Jersey City and reduced to writing, and is offered in evidence by the plaintiff himself. And this contract, the plaintiff says, was made after Keenan had been to see the barytes at New Brunswick, and after he had returned with his samples, and after Robinson had made a favorable report of the mines, all which seems to come in sad conflict with another part of the plaintiff's evidence, when he says that Keenan had made the agreement for the shipment of the barytes before he left the Bay of Fundy. The only

evidence in the case which goes to show the agency of Keenan is that of the plaintiff, when stating the interview between him and the defendant, at which he says that the defendant said he had a man in his employ who had relatives in the vicinity of the barytes; that he was going there to see them, and he, the defendant, would get him to go and see the barytes. The plaintiff seems to have understood the defendant as referring to Keenan, for he knew him; but it does not appear that the name of Keenan was mentioned by Fitch, or that he said a word about making him his agent in the matter, or that he would be clothed with authority to act in the premises; nor does it appear by any evidence that Keenan, at the mines, or at the Bay of Fundy, or elsewhere, either offered or claimed any agency or authority from the defendant to act in the matter except that the plaintiff and Morrison say that when examining the barytes, he ordered it shipped immediately. And yet it was after all this, and after Keenan had returned with his samples, and after the plaintiff had written to the defendant under date of the 11th of September, that the defendant, in reply to that letter, on the 22d of September, wrote the letter before us in manuscript, informing the plaintiff that he wanted the barytes, and if they could make an arrangement with him on as favorable terms as with others, they would give him the preference, and inviting him to come to New York, showing, that at this time no agreement had yet been made. Five days after this the parties were together at New York, and the contract was made, reduced to writing, and signed by the defendant. It is also manifest enough that the article was never shipped till after the written contract with the defendant. The contract is dated September 27th. The plaintiff drew his first draft on the defendant on the 14th of October following, payable at three months, and on the 12th of November, or thereabouts, the cargo arrived at New York, the duties being paid on that day and the freight on the 19th. All this seems quite inconsistent with the idea that the arrangement for shipping was made early in September with Keenan, as the agent of the defendant, and that the barytes was shipped under his order and by his authority; but over and above all this difficulty in the way of the plaintiff, this whole view of the case is positively and totally denied

by Fitch and Keenan, by Gordon and Tresdale—all denying that Keenan had any such authority or that he was employed on any such errand. That all he did or was authorized to do was to procure samples, which he did. And the plaintiff himself says, at the close of his first examination, "I bargained with Fitch for the barytes; all the terms were arranged with Fitch."

I can not see, therefore, anything in the evidence to justify such an allowance for such barytes, and think the report in this respect is against the clear weight of evidence, and should for this reason be set aside.

The referee has allowed interest on the claim at the rate of seven per cent., which I think is wrong. It does not clearly appear where the parties were when the contract was made, though it seems probable they were in New York. The contract is not dated at any place. The only party to it living in the county, and to whom the barytes was to be delivered in performing the contract, resides, as the contract says, in New Jersey, and by its terms it is to be performed and finished in this State, which would make the indebtedness, if any, carry but six per cent. interest.

I do not feel at liberty to say, as a matter of law, that the barytes possessed no value at all, or that the defendant from the entire failure of consideration, should recover back the $600 advanced on the contract. These are matters of fact on which a jury should pass under a proper charge. Nor do I find it necessary now to say which of the parties should be required to pay the duties on the article. The written agreement is silent on the subject. The legal inference is, that the plaintiff should pay it; but the evidence outside of the contract is very contradictory—the two parties who alone spake on the subject, give directly different versions of the understanding between them. This question, also, I think, should be submitted to a jury to determine, if need be, on the whole evidence, on whom the obligation devolved.

Let the report of the referee be set aside, and a new trial granted or a new hearing had.

WIGGINS v. MCDONALD.

(18 California, 126. Supreme Court, 1861.)

[1] **Assuming debt as consideration—Parties.** A party, upon the purchase of mining claims, agreed in writing, as part of the consideration, to pay the debt of his vendor to a third party. *Held*, that suit was rightfully brought against such purchaser by the third party in his own name.

Appeal from the Eleventh District.

In November, 1857, defendant purchased of the Empire Mining Company their mining claims for $8,000 in cash and an agreement on the part of defendant to pay certain demands against these claims, among which was a debt due plaintiff. Defendant executed and delivered to plaintiff and one Linn a writing as follows, to wit:

"FOREST HILL, November 30, 1857.

"I promise to pay to Robert Linn and Ambrose Wiggins their lawful demands against the Empire claims as soon as it comes out of the claims of the Empire Co.'s claims.

(Signed) "JAMES MCDONALD."

Defendant went into possession of the claims and took out more than gold enough to pay plaintiff and all other claims against the company. Plaintiff's demand against the company was independent of the demand of Linn. Plaintiff sues on this writing and the agreement to pay him. Judgment for plaintiff; defendant appeals.

TUTTLE & HILLYER, for appellant.

THOS. H. WILLIAMS, and HALE & SMITH, for defendant.

COPE, J., delivered the opinion of the court—FIELD, C. J., and BALDWIN, J., concurring.

We have no doubt of the right of the plaintiff to maintain this action. The defendant was indebted to the Empire Mining Company, who were indebted to the plaintiff, and it was agreed by all the parties that the defendant should pay to the plaintiff the amount of this indebtedness. If the rights of the plaintiff were to be determined by the rules of the com-

[1] *Paxton* v. *Bacon Co.*, 2 Nev. 257; *Post* CORPORATION.

mon law, it might be a question whether the action could be maintained in its present form; but there is no doubt that the transaction amounted to an equitable assignment of the debt, and under our practice the only mode in which this assignment can be enforced is by an action in the name of the assignee for the recovery of the debt. We have but one form of action for the enforcement of private rights, and with certain exceptions, the statute requires that every action shall be prosecuted in the name of the real party in interest. Cases of assignment are not included in these exceptions, and in the form of the remedy no distinction exists between legal and equitable rights. In this respect the two classes of rights are placed precisely upon the same footing, and must undergo the same remedial process for their enforcement.

It is not essential to the validity of the assignment that any particular form of transfer should have been adopted. An appropriation of the fund was all that was necessary, and any act amounting to such an appropriation was sufficient to constitute an equitable assignment of the debt. This accords with the rule laid down by Judge Story in his work on Equity Jurisprudence, and we have no statutory provision derogating from the effect of this rule.

This view relieves the case of any question upon the statute of frauds.

Judgment affirmed.

VERZAN v. McGREGOR ET AL.

(23 California, 339. Supreme Court, 1863.)

Words below signature. Words added to a contract, following the signatures, may be shown by parol evidence to form parcel of the contract.

Tunnel to be completed by date certain—Mistake. Defendants agreed, among other things, to finish a tunnel by a certain date, and that if not finished within such time they would forfeit the contract, and all moneys due on the same. The work was not finished until long after the time specified, but the defendants asserted that the length of the tunnel to be driven was much longer than the company represented, and the rock in the tunnel was found to be much harder than was anticipated, and

harder than represented by the company. *Held*, that if the parties were mutually mistaken in regard to the length of the tunnel, and the time fixed was based on such mistake, the stipulation as to the time would be void, and the defendants would have a reasonable time in which to complete the work. Or, if the company represented the tunnel to be shorter than it really was, and the defendants believed such representations to be true and acted thereon in fixing the time of completion, then the clause as to time and forfeiture would be void and defendants would be entitled to a reasonable time.

Too general denial, construed as specific admission. Plaintiff objected to the admission of a contract in evidence, on the ground that it was not the contract of a certain ditch company. The company, a party, in its answer denied that "it ever entered into any such contract as is set forth in the defendant's cross-bill, etc." *Held*, that this was not a specific denial that the company was the real party to the contract, and was, therefore, an admission that it was such party, and that it was not error to overrule the objection to the evidence.

Appeal from the District Court of Butte County, Fifteenth Judicial District.

H. O. BEATTY, for appellant.

S. ROSENBAUM, for respondents.

CROCKER, J., delivered the opinion of the court—NORTON, J., concurring.

This is an action to recover the possession of a ditch or canal used to convey water for mining purposes. The ditch was originally owned by the "Table Mountain Ditch Co.," and had been sold under a judgment and execution against the company, and purchased by one Rhodes, and by him conveyed to the plaintiff. The sale to Rhodes was made on the sixteenth day of April, 1860. On the twenty-ninth day of May, 1859, the defendants entered into contract with the company, by which they agreed to finish, widen, deepen and repair the ditch; dig a tunnel, and erect several flumes connected with the ditch; and agreed to finish the work in November, 1859. The defendants are in possession of the property under this contract, claiming the right to retain the possession until they are paid for the labor done on the work. This claim of the defendants is founded upon the following writing, which is written under the contract just below the signatures of the parties, but is not signed by either of them, independent of the

signatures to the contract itself, which precede it. It is as follows: "The Table Mountain Ditch Co. agree to give to the parties of the first part, the right of way for digging the ditch. And the parties of the second part, *agreeing to give the parties of the first part the ditch as security till the whole is paid.* Also agreeing to build two sufficient reservoirs to hold water from said ditch; one at the end of the long flume, also one on Table Mountain. Failing to build such reservoirs, to pay interest on all money due the parties of the first part."

One important question in the case is, whether or not this memorandum forms any part of the contract between the parties. On this point Nesbit and Saucier, the subscribing witnesses, whose names are subscribed to the main contract above the memorandum, were examined before the court. Nesbit testified that he was present when the contract was signed, and was called to witness it. Several hours were spent in discussing it. Defendants wished security for their pay. Tyre (who acted for the company) said he was willing to give security for their pay, if the defendants would give security for finishing their work; and it was agreed that the defendants should give security for the performance of their contract to the amount of five hundred dollars. Tyre then wrote the memorandum as security for the payment on the contract, and the defendants left to get security before the memorandum was signed; that when he signed as a subscribing witness, McGregor was on one side of him and Tyre on the other. Witness asked why the memorandum was not signed. Tyre replied that the memorandum had nothing to do with the contract; and McGregor was standing by his side at the time, within three feet of him, and made no response. He supposes McGregor must have heard him ask the question. The memorandum was to be executed conditionally; and he is certain defendants so understood it. The defendants refused to take the contract unless security was given; and they said they would give security to the company, if the latter would give the memorandum. Nothing was said about the memorandum when the contract was delivered.

Saucier, the other attesting witness, testified that he was present when the memorandum was written. It was talked

over for an hour or more. Tyre wrote the memorandum and read it, and both parties then signed. The memorandum seemed to make the contract satisfactory; noticed that the paper was signed above the memorandum. The paper was ready for signing before the memorandum was written. It was read as a part of the contract. The witness thought it a part of the contract, and thinks all thought so. He did not hear any consultation about security. Several other witnesses, including McGregor, one of the defendants, were examined on this point, and some of them state that it was agreed that it was written as a mere memorandum until the defendants gave security in the amount of $500 and then to be signed. It seems that the defendants never gave this $500 security. The court below, after hearing all the evidence upon this point, held, that the memorandum formed no part of the contract, and excluded it from the jury; but afterward, upon a statement of the defendants that they claimed that the acts of the company were a fraud upon them if the memorandum was excluded, and that this fraud was for the jury to determine, the court permitted it to be read to the jury in connection with the parol evidence. The jury found a general verdict for the defendants, and also a special verdict upon several questions; among others, "that the defendants had a lien and possession of the ditch as security for the payment of their demands for labor and materials furnished and used in said ditch, tunnels, and flumes," and that Rhodes and the plaintiff had notice of the lien.

The first question to determine is, whether the court erred in submitting the contract and memorandum together to the jury. The general rule is, that it is for the court to determine all questions relating to the admissibility of evidence; and when this question of admissibility depends upon the decision of other questions of fact, such as the execution of a contract or agreement, these preliminary facts are, in the first instance, to be tried by the judge; but he may at his discretion, take the opinion of the jury upon them. Often these preliminary questions are mixed questions of law and fact; or the evidence may be conflicting as to whether the instrument was in fact executed or delivered by the parties; in which case it is proper to submit the question to the jury under proper instructions

from the court. It is enough to authorize such submission to the jury that there is some proof of the facts on which the right to admit the evidence is predicated: 1 Greenl. Ev. Sec. 49. It is often the case that the main question in controversy is the execution and authenticity of the instrument. And the rule is, that if there be no evidence of authenticity, the instrument can not be read to the jury; but "if there be any fact or circumstances tending to prove the authenticity from which it might be presumed, then the instrument is to be read to the jury, and the question like other matters of fact, is for their decision: 2 Phillips' Ev., C. H. & E.'s Notes, 503, Note. And when a *prima facie* case of execution has once been made, the court is not to allow the other party to adduce counter proof before the instrument is read, and thus assume to take the question from the jury: Id. Testing the present case by these rules, it is manifest that the court erred —first in permitting the plaintiff to introduce counter proof after the defendants had made a *prima facie* case of execution; second, in deciding that the memorandum formed no part of the contract between the parties after such *prima facie* proof had been made, thus taking the question from the jury; but these errors were corrected by afterward permitting the instrument to be read, and leaving the question of its authenticity to the jury. So the action of the court, taken as a whole, forms no grounds for reversing the case.

The next question is, whether parol evidence was admissible to show that the memorandum formed part of the contract or agreement of the parties. As a general rule, parol evidence is not admissible when it relates to the *construction* to be given to a written contract; but such evidence is admissible when it relates to the execution or authenticity of the instrument, or to its delivery, or whether the delivery was absolute or conditional. In such cases the execution and acts of delivery being mostly a matter *in pais*, oral declarations of intentions connected with the execution and delivery may properly come in as part of the *res gestæ:* 2 Phillips' Ev., C. H. & E.'s Notes, 754. On this point, the case of *Heywood* v. *Perrin*, 10 Pick. 228, is very similar to the present. In that case a promissory note, payable on demand, had been signed by the defendant; but before its delivery the defendant objected to it because it

was payable on demand, and thereupon the following memorandum was written at the bottom of the note, below the signature of the defendant and the attestation of a subscribing witness, to wit: "One half to be paid in twelve months, the balance in twenty-four months;" and it was then delivered to the payee. The court held, that it was competent for either party to prove by parol evidence the time when, the person by whom, and the circumstances under which the memorandum was affixed to the note. But evidence of the declarations of the promisee as to his intention in taking the contract in that form, and as to his understanding of the meaning and construction of its terms, could have no effect in giving a construction to the instrument, as the court was bound to construe it according to its terms, and could not be aided by the declarations of the parties made at the time. The court, therefore, held that the words "payable on demand," in the body of the note, were qualified and controlled by the memorandum at the bottom.

The evidence upon this point, in the present case, was somewhat conflicting, and it was a proper matter for the jury to determine after hearing all the testimony; and as their conclusion is sustained by the court below in refusing a new trial, we should not be justified in disturbing the verdict on the ground that it is not sustained by the evidence. It seems that some of the testimony on this point was given to the court in the absence of the jury, and was not restated by the witnesses to the jury. It was the fault of the plaintiff that the evidence was not restated to the jury after the court decided to submit the whole matter to the jury. If he had re-offered such testimony, and the court had excluded it he would then have had some ground on which to predicate error.

The contract set up by the defendants contains this clause: "The parties of the first part also agree to finish the whole work on or before the fifteenth of November, 1859; and they expressly agree that if the tunnel, ditch and flume, are not finished within ten days of the time specified, they will forfeit the contract, as also all moneys due on the same." The work was not finished until long after the time specified; and the defendants set up as reasons for the delay, that the tunnel to

be constructed was much longer than the company represented, and the rock in the tunnel was found to be much harder than was anticipated, and harder than was represented by the company. The court instructed the jury that the time was not of the essence of the contract, and a failure to complete within the time would not be a forfeiture of the amount due under the contract for labor and materials that were of actual value to the company; and if the parties were mutually mistaken in regard to the length of the tunnel, and the time fixed was based on such mistake, the stipulation as to time would be void, and the defendants would have a reasonable time in which to complete the work. Or if the company represented the tunnel to be shorter than it really was, and if the defendants believed such representation to be true, and acted thereon in fixing the time for completion, then the clause as to time and forfeiture would be void, and defendants would be entitled to a reasonable time. To these instructions the plaintiff excepted, and asked the court to instruct them "that if the defendants had not completed their work within ten days after the fifteenth of November, they could not claim any lien or other advantages under the contract, but could at most only recover the reasonable value of their work, without lien or other advantages from the contract," which the court refused, and this is assigned as error.

Where an act is done or a contract is made under an injurious mistake or ignorance of a material fact, it is voidable; and this rule is not limited to cases where there has been a fraudulent concealment and suppression of facts, but extends also to cases of innocent misapprehension and mistake: Story on Cont., Sec. 409; 1 Story's Eq., Sec. 140. It is not necessary, in a case of this kind, where the mistake or misrepresentation only affects one out of many stipulations in a contract, to treat the whole agreement as void, but only that portion to which the mistake or misrepresentation properly applies. The rule in equity is, that if there has been any undue concealment or misrepresentation, the injured party will be placed in the same situation, and the other party will be compelled to do the same acts, as if all had been transacted with the utmost good faith: 1 Story's Eq., Sec. 439. In this

case, the evidence and instructions given on this point are intended merely to prevent a forfeiture claimed under a clause inserted under a mistake as to the facts, and a misrepresentation by the company's agents of those facts most material to this part of the contract. The fact that this evidence was used to defeat the claim of forfeiture will not deprive the defendants of the other valid clauses in the agreement not affected thereby, and compel them to rely upon a mere implied contract to pay the value of the work done.[1] In this view of the case, the court did not err in giving the instructions objected to, or in refusing the instructions asked by the defendants.

The contract in controversy, in describing the parties, reads as follows: "This agreement, entered into this 29th day of May, 1859, between Robert McGregor and James Newton, parties of the first part, and David Tyre, C. A. Simmons, and Thomas Cairns, Directors of the Table Mountain Ditch Company, parties of the second part, witnesseth," etc. The agreement refers to the ditch, tunnels, and flumes "of the Table Mountain Ditch Company," as the subject-matter of the contract. It is signed by Tyre, Simmons and Cairns, without any official designation, or statement of the capacity in which they sign, attached thereto; but the memorandum commences thus: "The Table Mountain Ditch Company hereby agrees," etc. The contract seems to have been filed and kept with other papers of the company, by its secretary. The plaintiff objected to the admission of the contract in evidence, on the ground that it was not the contract of the company, but only of Tyre, Simmons and Cairns, who signed it. The defendants aver, in their answer, that the contract was entered into "with the Table Mountain Ditch Company." The company, who were made parties to the suit by the answer, which was in the nature of a cross-complaint, in their answer merely deny that "it ever entered into any such contract as is set forth in the cross-bill," etc. The plaintiffs, in their replication to the answer, say that "it is not true, as charged in said answer, that the Table Mountain Ditch Company agreed with the defendants to give to them," etc. The answer and replication are clearly evasive, and do not specifically deny that the

[1] *McClelland* v. *Snider*, 2 M. R. 532.

company were the real parties to the contract, and bound thereby. If it had been the intention to raise that distinct issue, it should have been done by more direct specific denials or averments. As was said in *Rowe* v. *The Table Mountain Water Company*, 10 Cal. 444, where a similar point was raised: "We can not see why the corporation, if it chose to do so, could not as well bind itself in this form as in any other." The averment in the complaint is admitted by the failure to specifically deny it. There is sufficient in the contract itself to show that the company were the parties really interested; so that it is not impossible, in fact, for the contract thus executed to be the contract of the corporation, in which case the objection fails. It seems, too, that the corporation acted under it, by making payments thereon, and putting the defendants in possession of the ditch; and they receive the benefit of the defendants' work thereon. These are strong circumstances to show the liability of the company: Angell & Ames on Corp., Sec. 296. There was, therefore, no error in this action of the court. We have thus examined all the material points raised by the appellant, and find no just ground for disturbing the verdict and judgment.

The judgment is therefore affirmed.

CULLUM v. WAGSTAFF.

(48 Pa. St. 300. Supreme Court, 1864.)

Bill of exceptions. A bill of exceptions should state the ground of objection to evidence, and if the record go up on a general objection only, the ruling of the court will be sustained if the evidence be proper for any purpose.

Delivery of oil. Upon contract to deliver oil barrels on board of boats "preparatory to running out on the first water," the barrels to be paid for on delivery, *held*, that the vendor was bound to load the barrels, or at least to notify the purchaser of his readiness to load them, and that merely having them in readiness on the bank without notifying the purchaser until after the rise of the water, did not sustain the defense of performance or readiness to perform.

Weights and measures—Oil barrels. Where a defendant has contracted to deliver a number of barrels of oil, but of no specified capacity, it is for the jury to determine whether the contract was fulfilled by a delivery

of a less number of vessels of a greater capacity than the statute barrel; and it is not error (no specific instruction to the effect that in the absence of a standard fixed by the parties the statute standard must govern, having been prayed for) to leave the whole question to the jury, there being evidence showing that the oil barrel in common use contained a different number of gallons (40) from the statute barrel of thirty-one and a half gallons.

Error to the Common Pleas of Venango County.

This was an action of *assumpsit*, by David Wagstaff against H. Cullum, to recover damages for the non-delivery of five hundred oil barrels and thirty-five barrels of crude petroleum, to which was added a claim for money had and received, and the use and occupation of a boat which the plaintiff averred he had bought of defendant, but which the latter had sold at Pittsburgh.

The contract for the barrels and boat was as follows: "This is to certify, that Horace Cullum, of Meadville, Penna., and F. T. Munson, agent, of Weedsport, Cayuga Co., N. Y., have agreed as follows:

Said Cullum is to furnish one thousand oil barrels at $1.80 per barrel, at Meadville, for said Munson. Five hundred to be sent at once to Shaw's Landing, at five cents per barrel, free of any other charge. The other five hundred to be put upon French creek boat (now lying in French creek) when the first water comes sufficient to run out the boat with five hundred empty barrels.

"This is further to certify, that said Cullum has this day sold to said Munson, agent, a French creek boat, now lying in French creek, for the sum of $80; said boat is to be in proper order for running five hundred empty barrels safely out of the creek by the time the first water comes sufficient to run said boat and load out. Said Munson, agent, is to give a draft on David Wagstaff, of N. Y. city, for the payment of same. Payment of the first five hundred and boat to be made as soon as the first five hundred barrels are delivered at Shaw's Landing, by presenting a receipt from Shaw that they are so delivered at his landing. The other five hundred to be paid for as soon as they are delivered on board the boat in French creek (preparatory for running out on the first water), said

draft on Wagstaff to be on sixty days' time, said Munson, agent, paying the discount to said Cullum.

"H. CULLUM,
"F. T. MUNSON, Agent.

"Meadville, September 27th, 1862."

On the 3d November, 1862, the same Munson, agent, bought from Cullum one thousand barrels of oil, for which Cullum gave him an order on one Olmstead. It was admitted by Munson that he had received from Olmstead, on this order nine hundred and sixty-five vessels full of oil, each containing forty gallons, or in the aggregate more than one thousand statute barrels. Olmstead refused to deliver any more oil, claiming that he had filled the order. The evidence of Munson was that nothing was said about the size or capacity of barrels when he made the contract for the oil, but it was claimed that according to the custom of the oil region the plaintiff was entitled to forty gallons to the barrel.

On the trial it appeared that five hundred of the oil barrels were "delivered at Shaw's" but the remaining five hundred were not loaded or ready for delivery at the time stipulated in the contract, although they were sent for and defendant was informed by telegraph, after the "first rise in the water" that a draft for the price was ready at any time. On the second rise of the river the barrels were run down and sold by the defendant as his own.

The plaintiff also offered to prove "the price of barrels in Franklin and Oil City for the purpose of showing damages;" to which defendant objected generally, but without stating in his bill of exceptions any particular ground of objection, or any reason why the evidence should not be received.

The court overruled the objection and admitted the evidence.

The defendant requested the court to instruct the jury:

1. The plaintiff having neglected to come for the barrels and pay for them at the time of the first or second rise in French creek, can not recover damages for the non-delivery of the barrels.

2. There is no sufficient evidence that the plaintiff did not receive all the oil purchased from defendant.

3. The plaintiff having shown that on his purchase of one thousand barrels of oil he has received nine hundred and

sixty-five vessels full, each holding more than forty gallons, can not claim a deficiency in the delivery.

Which the court below answered as follows:

"1. Whether there was neglect on the part of plaintiff's agent in not looking after the barrels at the time of the first and second rises in French creek, is for the jury. The plaintiff was bound by the contract to give a draft for the last five hundred barrels as soon as they were delivered on board of the boat in French creek; and until they were so delivered the defendant could not demand or claim the draft—the defendant could not run off the barrels and sell them to another without first giving notice or endeavoring to do so, to plaintiff or his agent, without first waiting a reasonable time after the barrels were delivered on the boat. If Cullum had either given notice or waited a reasonable time, plaintiff can not recover damages for the barrels. If not, plaintiff is entitled to such damage as he sustained.

"2. There is some evidence that plaintiff did not receive all the oil purchased, and the effect of it is for the jury.

"3. Whether a statute barrel of thirty-one and a half gallons was intended by the parties, or one of Cullum's barrels, holding more than that, is for the jury from all the evidence."

Under these instructions there was a verdict and judgment for plaintiff. Whereupon the defendant sued out this writ, averring here that the court below erred in admitting evidence of the price of barrels at Franklin and Oil City, and in not charging the jury as requested in the points above given.

HEYDRICK & SNOWDEN, for plaintiff in error.

JOHN S. MC CALMONT, for defendant.

By the Court, AGNEW, J.

The point made by the plaintiff in error upon the bill of exception to the admission of evidence of the price of oil barrels at Franklin and Oil City is, that it was the market value at Meadville which should govern. The bill merely states that the plaintiff offered to prove the price at these places for the purpose of showing damages, to which the de-

fendant objected. But on what ground did he object? His bill does not inform us. The ground stated orally to the court might be entirely insufficient. Great injustice might be done to the court below in presuming it was upon the ground taken here. A judge is not bound, nay, can not always think of every objection which can be urged. He decides upon the objection stated by the counsel, and it is the duty of counsel to see that his point goes fairly into the bill. In legal contemplation the bill is drawn up and presented by the party who excepts, and though a note of it at the time is sufficient, it is his duty to see that the bill is made up correctly before it is tacked to the record.

The party offering evidence is bound, if requested, to state the purpose of it fully, and the party who objects must state his objection. If he decline to do so, it is good ground for the court to overrule a general objection; or if the record go up on a general objection only, the ruling of the court will be sustained if the evidence be proper for any purpose: *Milliken* v. *Barr*, 7 Barr 23; *Richardson* v. *Stewart*, 4 Binn. 201; *Benner* v. *Hauser*, 11 S. & R. 356; *Smull* v. *Jones*, 6 W. & S. 125. These rules are necessary to prevent injustice, both to court and parties. This bill does not fairly raise the point we are asked to decide.

We see no error in the answer to the defendant's first point. The court could not answer it as requested, without charging the facts stated in it to be true. These facts were not admitted, and the court, therefore, left them to the jury, with instructions upon the effect of the contract, and the duty of the parties under it.

The contract required the defendant to put the last five hundred barrels upon the boat then lying in French creek, which, by the same contract, he sold to the plaintiff. He was to be paid for the barrels by a draft as soon as they were delivered on board of the boat in French creek, "preparatory for running out on the first water." The barrels were not delivered on board, but were merely held in readiness for delivery when the rise in the water came. The court, therefore, charged that the defendant was bound to notify the plaintiff of his readiness to deliver them, or to deliver them on board and wait a reasonable time before disposing of them to an-

other. In effect the instruction was, that the defendant not having complied with the contract himself, and having run them off and sold them, could not set up the plaintiff's want of readiness, caused by his own act. It is certainly true, where mutual or concomitant acts are to be performed, a party can not recover without showing his own readiness to perform. But here, until the plaintiff had notice of the defendant's readiness to load the barrels on board, or until they were actually on board, he could not know when to be ready to tender the draft. The time of his performance had not arrived, nor could it arrive until the defendant moved in the matter by loading the barrels. If the defendant was ready to load them, as he asserts, at least he should have informed the plaintiff of the fact. Instead of this, he holds the barrels until after the rise, then loads them upon the second rise, and runs them down and sells them as his own.

The third and fourth specifications of error raise the same question, founded upon the answer of the court to the defend ant's third point.

This point asked the court to say that the receipt of nine hundred and sixty-five vessels of oil, each containing forty gallons, satisfied the defendant's contract for one thousand barrels of oil. This depended upon the intention of the parties as to the kind of barrel meant. The court left it to the jury to say whether they meant a statute barrel of thirty-one and a half gallons, or one holding more, for the oil barrel in common use contains forty gallons, as shown by the evidence. There was no error in this; the contract being by parol, its interpretation upon the evidence belonged to the jury. If the defendant desired a specific instruction, that in the absence of a standard of measurement fixed by the contract, the statute standard of thirty-one and a half gallons to the barrel should govern, he should have asked it in such terms as would present the question fairly to the mind of the court. The answer of the court to his proposition in the form it was put was not unfair, and he can not complain of it, therefore, in this court.

The judgment is affirmed.

SAVAGE, RECEIVER OF THE NEW JERSEY FRANKLINITE COMPANY, v. BALL ET AL.

(17 N. J. Eq. 142. Court of Chancery, 1864.)

Injunction—Consideration. H. held stock of The C. F. Co., which at the instance of B. & Co. he transferred to The C. F. Co., through Van R., who paid H. therefor $5,000 cash, Van R. receiving from B. & Co. their notes for the same sum. In payment for this service The C. F. Co. gave B. & Co. a note for $5,000. Upon motion to dissolve an injunction against the collection of this last named note, *held*, that there was a good consideration for the note of The C. F Co., that it was no defense to an action on the note that B. & Co.'s notes had not been paid, and that the injunction would be dissolved.

Corporations—Officers de facto. The acts of the *de facto* officers of a mining corporation are valid whenever they concern third persons who had a previous right to demand the act, or have paid a valuable consideration for it.

Stock—Issue to defaulting contractor. The issue of the stock of a mining company to a firm which had subscribed to stock of a railroad company, and had entered into a contract with the railroad company to build a part of its road at the request of the mining company, the issue being approved by both directors and stockholders, is valid, although the contract to build the road was never carried out, and although the company may be in equity entitled to a return of its stock.

Note of insolvent corporation. The insolvency of a mining company does not of itself invalidate a note given for a *bona fide* debt.

This bill was filed to enjoin proceedings at law upon a promissory note for $5,000, purporting to have been given by The Consolidated Franklinite Company, of New Jersey, to A. H. Ball & Co, on April 26, 1861. The injunction issued, pursuant to the prayer of the bill, on December 12, 1863. The defendants, having answered, now move to dissolve the injunction on the ground that the equity of the bill is fully denied by the answer.

Mr. RANNEY, for defendants, in support of the motion.

Mr. B. WILLIAMSON, for complainant, *contra*.

The Chancellor (GREEN).

The grounds upon which the injunction was prayed for and allowed were, that the note was without consideration, and that it was obtained by fraud.

The charges of the bill are explicitly denied by the answer,

and the real consideration of the note is set forth. It is averred that one Samuel F. Headley held in his hands stock of the corporation to the amount of $260,000, and that Ball & Co., at the instance of the corporation, procured the transfer of the stock to the corporation through one Henry Van Rensselear, for $5,000, which sum was paid by Van Rensselear to Headley in cash, and by Ball & Co. to Van Rensselear, in the notes of the said Ball & Co. It is objected to this statement of the consideration, that there is no averment that the notes to Van Rensselear were ever paid, or that Ball & Co. have ever advanced one dollar on account of them. The notes of Ball & Co. were given to Van Rensselear, who advanced the $5,000 in cash, at the instance and for the benefit of the company. Whether, therefore, the notes of Ball & Co. are paid or not, is a matter with which the company have no concern. They have received full value for their note, and the loss by Van Rensselear can constitute no defense to an action upon the note of the company. There was a good and valid consideration for the note at the time it was given. Even if the notes of Ball & Co. had been given directly to the corporation in exchange for its note, it would have been a sufficient consideration. The one promise is a good consideration for the other: *Gilbert* v. *Duncan*, 5 Dutcher 145, 529; *Cameron* v. *Chappell*, 24 Wend. 94; *Dowe* v. *Schutt*, 2 Denio 621; *Davis* v. *McCready*, 17 New York 232.

The bill further charges that the directors of the company, by whom the note was authorized to be executed, were not legally elected and were not qualified to act as directors for various reasons, and among others, because at the time of their election they were not stockholders of the company. And it is urged that the charge of their not being stockholders is not explicitly denied by the answer. I think the answer, in connection with the affidavit of one of the defendants, does contain a full denial of the charge. But if it be admitted that the answer upon this point is not satisfactory, and that the directors were neither duly qualified nor legally elected, it will not affect the validity of the note. It is admitted that the directors by whom the note was authorized to be made, were by color of election directors *de facto*. The act of an officer *de facto* is good wherever it concerns a third person who had

a previous right to the act, or had paid a valuable consideration for it: *Riddle* v. *County of Bedford*, 7 Serg. & R. 392; Angell & Ames on Corp. § 287.

The bill further charges, that the stock which was voted upon at the election for directors, and by virtue of which the directors were elected, was issued fraudulently and without consideration to Ball & Co., and that therefore the election was null and void.

This charge of fraud is denied, in express terms, by the answer, and the consideration for the issue of the stock is set out specifically at length. The substance of the answer upon this point is: That the Sussex and Warren Railroad Company proposed to construct their road upon the basis of a stock subscription. That thereupon the Franklinite Company, who were interested in the construction of the road, applied to Ball & Co., who were railroad contractors, to build the road upon the basis of a stock subscription. It was thereupon agreed by the directors of the Franklinite Company, that if Ball & Co. would contract to build the road upon the basis of the stock subscription, and would subscribe for $200,000 worth of the stock of the railroad company for that purpose, the Franklinite Company would convey as many shares of the stock as should be agreed upon by the president and Ball & Co., subject to the approval of the directors. That Ball & Co., having subsequently entered into the contract with the railroad company to build the road, and having subscribed for $200,000 worth of the stock of that company, the president of the Franklinite Company agreed to transfer 8,000 shares of the stock of that company to Ball & Co. That the directors of the Franklinite Company subsequently approved the action of the president, and the stock was transferred accordingly. And that at a meeting of the stockholders subsequently held, the resolution of the directors was approved by the stockholders.

It is unnecessary to express any opinion in regard to the character or operation of this contract, further than as it may affect the validity of the issue of the stock of the Franklinite Company to Ball & Co. The allegation of the defendants in answer to the charge that the stock was issued without consideration is, that it was issued in consideration of an en-

gagement by Ball & Co. to construct a railroad at the instance of the Franklinite Company, and a subscription for that purpose by Ball & Co. for $200,000 worth of the stock of the railroad company. Assuming that the railroad was never built, and the stock consequently never paid for, admitting that the Franklinite Company are entitled in equity to a return of their stock, it does not, in any wise, impair the fairness or validity of the issue of the stock, or the legality of the election of directors, chosen by votes given upon the stock thus issued.

But there is another answer to this part of the case, viz.: that every vote cast at the election was for the same directors, and that if the stock issued to Ball & Co. had not been voted upon, the result of the election would have been in no wise altered.

A further exception is taken to the sufficiency of the answer as a ground for dissolving the injunction, because its denial of the insolvency of the company at the time charged in the declaration, is not sufficiently specific and unequivocal. The bill charges that the Consolidated Franklinite Company became insolvent and unable to pay its debts, prior to the 1st of August, 1861. And the defendants are interrogated, whether the said company was not insolvent on and before the 1st of August, 1861, and whether it has not continued insolvent since that time, and whether the said company has not been declared insolvent by the court of chancery of this State. The note in question bears date on the 26th of April, 1861, and matured prior to the 1st of August. The bill to have the company declared insolvent was exhibited in this court, and an injunction restraining the further exercise by the company of its corporate powers was issued on the 6th of February, 1863, eighteen months after the maturity of the note.

It is worthy of notice that the bill does not charge that the company was insolvent when the note was given, or that it was made to defraud the creditors of the company, or to gain any undue advantage in the distribution of its assets. The facts of the case negative any such idea. The sole ground of relief is that the note was fraudulent and without consideration, and made with the fraudulent intent of clandestinely selling the property of the company, and buying it them-

selves, without consideration, in fraud of creditors and the stockholders of the company.

All that is charged is, that the company was insolvent and so continued from and after the 1st of August, 1861, the day on which the suit upon the note is alleged to have been instituted. But that constitutes no ground of relief. The mere fact that the company was insolvent does not, of itself, render invalid or fraudulent a note given, or judgment confessed by them, for a *bona fide* debt. For eighteen months afterward, neither the creditors nor stockholders of the company took any measures to have the company declared insolvent, or to obtain the interference of this court. If, in the meantime, the holders of the note have by their proceedings at law, acquired a lien upon the property of the company and a priority over other creditors in the distribution of its assets, there is no good ground for disturbing such priority. If they have not acquired such lien, their proceeding to final judgment at law will affect no equitable right of other creditors, if such there be.

The injunction is dissolved.

HAMILTON ET AL. v. KNEELAND ET AL.

(1 Nevada, 40. Supreme Court, 1865.)

Estate upon condition—Forfeiture—Quartz mill engaging to drain mine by its steam power. A written agreement by which upon certain "terms and conditions" the parties of the second part were permitted to erect a steam quartz mill upon the surface of the mine owned by parties of the first part, and by which it was made the duty of the parties of the second part to finish the mill within a certain time, and afterward, among other things, to keep the said mine free from water, hoist ore, etc., by means of the steam power of the mill—gives the parties of the second part an "estate upon condition" in their improvements. *Held*, further, that upon refusal to pump the mine, a forfeiture was created by breach of condition. And that such forfeiture might be enforced, after demand for possession, without actual entry.

Appeal from the District Court of Storey County, First Judicial District.

The facts of this case sufficiently appear in the opinion of the court.

CRITTENDEN & SUNDERLAND and TOD ROBINSON, for appellants.

KIRKPATRICK & RHODES and G. A. NOURSE, for respondents.

By the Court, LEWIS, C. J.

This is an action of ejectment brought to recover possession of a mining claim located in Gold Hill, in the county of Storey. The complaint is in the usual form, alleging title in the plaintiffs, and ouster and wrongful holding by defendants. The defendants, Kneeland and Requa, answer jointly, admitting the title of Burke and Hamilton, but denying that they are entitled to the possession of the premises, or that they have any interest in the mill, machinery, pumps, fixtures, or other improvements connected with the same; also denying the ouster and wrongful withholding of the premises by them; and claiming the right of possession in themselves under and by virtue of a certain agreement which is made a part of their answer.

They allege that they have performed all the requirements of the agreement on their part, and aver their willingness to crush the five thousand tons of rock mentioned therein, when the same shall be furnished to them by the plaintiffs.

The case was referred to a referee to report facts and a judgment, and the following facts and conclusions of law were reported:

First. The ground in controversy is the property of the plaintiffs.

Second. On the 9th day of November, 1861, and at the time of making the contract hereinafter stated, said ground was the property of the plaintiffs A. C. Hamilton and E. R. Burke.

Third. Plaintiffs John Drynen, Charles W. Newman and Samuel Doake, purchased interests in said grounds subsequently to the 9th day of November, 1861.

Fourth. On the 9th day of November, 1861, plaintiffs Hamilton and Burke and Robert A. McLellan, made and

entered into an agreement in writing, a copy of which is made a part of the answer of defendants.

Fifth. On the 25th day of November, 1861, said Robert A. McLellan transferred and assigned to defendant, Isaac L. Requa, one fourth interest in said agreement, and conveyed a like interest in the quartz-mill and machinery in said premises; and on the 6th day of October, 1862, said McLellan conveyed an undivided three fourths of said mill and machinery to defendant, John Kneeland.

Sixth. On the 5th day of February, 1864, said John Kneeland leased three fourths, undivided, of said mill and machinery to Robert Carson; and on the 1st day of March, 1864, said Carson transferred and assigned said lease to intervener, E. B. Kenyon.

Seventh. Said E. B. Kenyon holds a mortgage and debt against defendant (Kneeland), as set out in the intervention herein.

Eighth. Said Carson and Kenyon went into possession of Kneeland's interest after the bringing of this suit, and with full knowledge of its pendency.

Ninth. The mill referred to in said contract between Hamilton and Burke and McLellan, was commenced in December, 1861, and completed in the latter part of October, 1862.

Tenth. The shaft mentioned in said agreement was sunk to the depth of two hundred and fifty-seven and seven twelfths feet from the surface of the ground, after the ground was graded, and a drift run easterly from said shaft about one hundred and twenty-five feet, crossing a ledge of pay rock about ten feet wide, and running about twenty-five feet beyond the ledge. The bottom of said drift was two hundred and forty-six feet below said surface. This work was done about a month before the mill was completed.

Eleventh. The pumping mentioned in said agreement started when the shaft was at the depth of one hundred and fifty feet, and ceased directly after the completion of the drift. At that time it was agreed by Burke and McLellan that the pumping might cease until the mill should be finished. There was no understanding that the pumping should stop altogether. It was impossible to work the ledge without

pumping to keep the mine free from water, and for this purpose steam machinery was necessary. Kneeland went into possession of the mill with Requa about the 1st of December, 1862. There was then about twenty-five feet of water in the shaft, and enough in the drift to prevent work. In that month, and in the following January, February and March, plaintiffs demanded that defendants should pump out the shaft, so that the ledge might be worked, but defendants positively refused. They were afterward frequently requested to go and pump, but never did so.

Twelfth. Plaintiffs offered to furnish ore if defendants would pump out the mine. If the mine had been pumped out, there could have been more than sufficient ore taken from it to supply the mill constantly to the extent of five thousand tons.

Thirteenth. Notice *lis pendens* was duly filed in the office of the county recorder of Storey county, on the 24th day of December, 1863.

Fourteenth. Plaintiffs demanded possession of the ground in controversy on the 28th day of December, 1863.

I find, as conclusions of law, from the foregoing facts, that by reason of the non-performance of the contract between Burke and Hamilton and McLellan, on the part of McLellan and these defendants, his assignees, said defendants had, before the commencement of this action, lost the right of possession of the disputed premises, and that the plaintiffs are entitled to the relief prayed for in their complaint.

A motion for new trial having been made and denied, the defendants appeal, assigning numerous errors, only four of which are relied upon in this court, which are:

First. That the referee erred in holding that a refusal on the part of the defendants to pump out the mine at the time, and under the circumstances, was a violation of the written agreement between Burke and Hamilton and McLellan.

Second. In holding that such violation of the contract worked a forfeiture.

Third. In holding that the terms of the contract were conditions and not covenants.

Fourth. In holding that the assignees could claim a forfeit-

ure of defendants' rights under the contract upon breach of condition.

If the agreement between Burke and Hamilton and McLellan is uncertain as to when the pumping by McLellan should commence, the intention of the parties to it, which is of controlling force when ascertained, should govern: 2 Parsons' Cont. 6; Id. 11. The conduct of the parties, the object which they had in view in entering into the agreement, and the manner in which they carried out this provision of it, establishes the fact beyond a peradventure that the pumping was to be done by defendants at the time the shaft was being sunk, if necessary. And indeed, it appears that no misunderstanding upon this point arose between the parties until the shaft had been sunk to its required depth, the ledge struck, and plaintiffs were ready to take out the ore.

But should the defendants' interpretation of this agreement be adopted, that is, that it was not their duty under it to pump the water from a prospecting shaft but only from the mine, it is equally fatal to their case, because it was the *mine* which they refused to pump, and that, too, when the plaintiffs were fully prepared to take out the ore.

Whatever difference of opinion there may exist as to the duty of the defendants to pump the water from the shaft, none can exist as to their duty to keep the *mine* free from water. The instrument itself is explicit upon the point. It provides: "That the said party of the second part shall furnish the motive power at the mill, and machinery to hoist the ore from the said mine as aforesaid, and shall also furnish the pump and necessary machinery, and pump from the said mine the water, so as to keep the same constantly freed of water, so that the said mining ground and claims can be safely and conveniently worked."

This was not done; but it seems the defendants persistently refused to pump out the mine after the ledge was struck in the lower drift. And the referee finds that "it was impossible to work the ledge without pumping to keep the mine free from water." By this refusal on the part of the defendants to perform their agreement in this particular, the very object for which the agreement was entered into by plaintiffs, that is, the development of their mines, was entirely defeated.

When the pumping was stopped for the benefit of McLellan, as it appears, and the mine in consequence thereof filled with water so that it could not be worked, for him and his assignees persistently to refuse to pump it, because, as it is claimed by them, it is not their duty to pump the mine until rock is furnished to them, is an exhibition of bad faith, to say the least of it, which should receive no favor in a court of justice. But did the violation of the agreement by the defendants work a forfeiture of their rights or the estate which they acquired under it? If the estate which the defendants acquired in the premises was upon condition, the breach of the condition will work a forfeiture of the estate; but if the stipulations of the agreement are to be construed as covenants and not conditions, then the plaintiffs have mistaken their remedy, and they must fail. After the erection of the mill upon the premises by McLellan, it is clear that he had an interest in the land, and I think it equally clear that that interest was an estate upon condition.

Chancellor KENT (vol. 4, p. 125) says: "Estates upon condition are such as have a qualification annexed to them by which they may, upon the happening of a particular event, be created or enlarged, *or defeated.*" After speaking of conditions in law, he says of conditions in deed: "These conditions are expressly mentioned in the contract between the parties, and the object of them is either to avoid or defeat an estate, as if a man, to use the case put by Littleton, enfeoffs another in fee, reserving to himself and his heirs a yearly rent, with an expressed condition annexed, that if the rent is unpaid the feoffer and his heirs may enter and hold the land free of the feoffment. So if a grant be to A in fee with a *proviso*, that if he did not pay twenty pounds by such a day, the estate should be void, and the grantor or his heirs may enter and take advantage of the breach by ejectment, though there be no clause of entry": Id. 127.

Conditions which will work a forfeiture of an estate, it is true, are not favored, and will not be readily implied; but the estate created in McLellan is so unmistakably upon condition, that we could not hold otherwise without disregarding the plain letter of the agreement and the evident intention of the parties. This agreement provides: "That

whereas the said Hamilton and Burke are the owners of the mining ground and claims of forty feet in width, part of the so-called 'Sabins ground,' in said Gold Hill, and being bounded on the northerly side by the mining ground of W. H. Irwin, and on the southerly side by the mining ground of Stewart, Kirkpatrick, and Churchill; and whereas, said parties have agreed that said party of the second part may erect a steam quartz-mill of sixteen stamps on said mining ground, for the working and reducing of five thousand tons of ore, to be taken from said mining claims and ground, on *certain terms and conditions.*"

The only rational and grammatical construction which can be put upon this language is, that McLellan was to have the privilege of erecting a steam quartz-mill on the plaintiff's premises, upon "the terms and conditions" which are specifically mentioned in the agreement itself, one of which was that he would "pump from the said mine the water, so as to keep the same constantly freed from water, so that the said mining ground and claims can be safely and conveniently worked."

Again, no precise words are required to create a condition: 2 Parsons's Con. 39.

"Indeed," says the same author, "courts seem to agree of late that the decision must always depend upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself, and from the subject-matter to which it relates. It can not depend upon any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract." But here we have the exact words to create a condition: *Gray* v. *Blanchard*, 8 Pick. 283.

And the evident intention of the parties, as shadowed forth in the entire instrument, harmonizes with these words.

Unless we believe that Burke and Hamilton intended to permit the erection of the mill in question on their premises, and to permit its continuance there, regardless of whether McLellan should perform his part of the agreement or not, the conclusion is irresistible that they only intended to permit it upon the conditions mentioned in the instrument itself. That would be the only advantage which they could possibly

derive from the location of the mill upon their premises, and it is not reasonable to suppose that they intended to permit the defendants to enjoy the premises except upon the performance of their part of the contract.

It is urged, though, by the defendants, that a breach of conditions can not be taken advantage of by a stranger. But Burke and Hamilton themselves are claiming this forfeiture, and the fact of their having conveyed a certain interest in the premises to strangers who are joined with them as plaintiffs, surely should not deprive them of the right of taking advantage of the breach of conditions.

But this rule of the common law, that a condition can not be reserved to any but the grantor and his heirs, I think has never been recognized as the law in this country, and it was completely overturned in England by the statute 32 Henry VIII, C. 34, which permitted grantees of reversions and privies in estate to take advantage of the breach of condition (4 Kent's Com. 126; 2 Cruise Dig., p. 4, Sec. 16); and in adopting the common law of England in this country, it seems to be the established doctrine that it is adopted as amended or altered by English statutes in force at the time of the emigration of our colonial ancestors: 1 Kent, 473; *Sackett* v. *Sackett*, 8 Pick. 309; *Patterson* v. *Winn*, 5 Pet. 233. With this view of what constitutes the common law of this country, I am of opinion that the grantees of Burke and Hamilton could take advantage of the breach of condition by the defendants.

For these reasons we think the judgment below should be affirmed.[1]

BEATTY, J., having been engaged as counsel below did not participate in this decision.

[1] On petition for rehearing, an opinion was delivered by BROSNAN, J., affirming the foregoing opinion and deciding some points of practice and also descanting upon the common law of England as applicable in this country, for which see 1 Nev. 55.

KNOWLTON V. SEWALL.

(10 Allen, 34. Supreme Court of Massachusetts, 1865.)

Wharfage on stone—Contract liability determined by sale of realty. K., the owner of a wharf, and S., the owner of a stone quarry, agreed in writing that all stone quarried on the premises of S. to be carried away in vessels, should be delivered at K.'s wharf at four cents per ton, wharfage, for nine years, and after that period at five cents per ton, wharfage. The agreement was fulfilled on each side for nine years, after which S. sold his quarry. *Held*, that K. could not recover for a failure by S. to carry to K.'s wharf the stone quarried after the sale, and that evidence to show that the usual price of wharfage for the nine years was five cents per ton, was incompetent.

The declaration alleged a failure on the part of defendant to carry a quantity of stone to plaintiff's wharf as provided by the following contract, signed and sealed by the parties:

"This indenture made this tenth day of December, in the year of our Lord, 1852, * * * witnesseth, that the said W. H. Knowlton, in consideration of the said Sewall's agreeing to carry all the stone quarried on his premises, that is to be carried away in vessels on the said William H. Knowlton's wharf, for the space of nine years, commencing the 1st of February, 1853, the said Knowlton agrees to receive as full compensation for wharfage four cents per ton for each and every ton of stone so carried away in vessels, the stone coming from said Sewall's quarry for the space of nine years, commencing February 1, 1853. And the said Sewall on his part agrees to carry all stone on the said Knowlton's wharf, that is quarried on his premises for the space of nine years, commencing February 1, 1853, that is to be carried away in vessels, and pay four cents per ton for wharfage for each and every ton of stone so carried away in vessels. And the said Sewall further agrees to continue to carry all stone that is quarried on his quarry that he now occupies on the said Knowlton's wharf, that is to be carried away in vessels, after the expiration of the nine years aforesaid, and pay the sum of five cents per ton for wharfage for each and every ton of stone so carried away in vessels, after the expiration of the nine years. And the said Knowlton further agrees to receive all stone coming from said Sewall's quarry, and to receive five cents per ton as full compensation for wharfage for each

and every ton of stone carried away in vessels after the expiration of the nine years aforesaid. And the said Knowlton agrees to furnish and prepare a place near Short Beach, so called, to deposit rough stone or ballast. And the said Knowlton agrees that the said Sewall shall have as good a privilege on his wharf and landing as he now has, in proportion to the business he does, and that said Knowlton will keep his wharf and dock in good repair, by having suitable time to do it after such repair is needed.

"To all of which stipulations, covenants and agreements, we, the parties aforesaid, do hereby mutually bind ourselves, our heirs, executors and administrators firmly by these presents."

At the trial in the superior court, before AMES, J., it appeared that the agreement was executed on both sides for nine years, and on the 10th of May, 1862, the defendant sold his quarry to other persons, after which the stone quarried there was not carried to plaintiff's wharf. The plaintiff offered to show that during the nine years after the making of the agreement, the usual rate of wharfage was five cents a ton; but the judge rejected the evidence, and ruled that upon the above facts the plaintiff could not recover. A verdict was accordingly taken for the defendant, and the case was reported for the determination of this court.

J. A. GILLIS and B. H. SMITH, for plaintiff.

S. B. IVES, Jr., and C. SEWALL, for defendant.

DEWEY, J.

The rulings of the superior court upon the legal effect of this somewhat anomalous contract seem to us to have been correct. We think that it must be understood, although very broad and unlimited in its language, to contemplate an arrangement only co-extensive with the continued ownership, or at least possession, by the parties of their respective estates. It imposed no obligation on the plaintiff to continue perpetually to be the owner of his estate, nor upon the defendant to continue perpetually to be the owner of the estate upon which the stone quarry was situated. It was cer-

tainly a contract all the benefits of which to the plaintiff were wholly dependent upon the voluntary action of the defendant in carrying on the business of quarrying stone. If there were no stone quarried on the premises, then the plaintiff would have no profits from the contract; but no ground would exist for complaint for any breach of any obligation assumed by the defendant. The parties having made this contract with no provision as to the period of its limitation, the court must give it a reasonable construction. The rulings at the trial upon that point, and upon the effect of the evidence relied upon by the plaintiff to show that the defendant still continued to have the possession and control of the stone quarry, furnish no ground for setting aside the verdict.

Judgment for the defendant.

PINCH V. ANTHONY ET AL.

(10 Allen, 470. Supreme Court of Massachusetts, 1865.)

Agency and salary pending sale or company organization. If the owners of mineral lands enter into a written agreement with another person, reciting their purpose either to sell the lands or form a joint stock company for working the mines thereon, and promising, in consideration of services rendered, and to be rendered by him, to pay him a certain sum "out of the proceeds of the sale of said lands, if the same shall be sold, or if the lands shall not be sold, and a company shall be formed for working the mines thereon," then to convey to him stock to that amount, "it being understood and agreed by and between the parties hereto that the foregoing amount, whether of cash or stock, is to be a charge on the joint estate" of the owners; and he, in consideration of the foregoing agreements, promises to remain in their service as long as they may require, not exceeding one year, for a salary of $100 per month, and a house and lot free of rent; the owners of the land are not bound to sell the same, or form a joint stock company, until by the exercise of reasonable diligence they are able to do so advantageously, having reference to the interest of all the parties, and until such sale, or the formation of such a company, or the existence of some negligence on their part, he has no claim against them, except for the stipulated salary.

Practice—Waiver. An objection to a supplemental bill in equity on the ground that it seeks to maintain the suit upon facts which have oc-

curred since the filing of the original bill is waived by omitting to demur to it upon that ground, and consenting to go into a full hearing before a master upon the merits of the case as set forth in the original and supplemental bill.

Bill in equity, filed April 16, 1861, alleging that in 1849 the plaintiff was a skillful miner employed at Crown Point, and was induced by persons who owned lands in Northampton, Southampton, Easthampton and Westhampton, to leave his employment for the purpose of conducting mining operations upon said lands; that those persons, after executing to the plaintiff a mortgage on the mineral rights in said lands to secure the sum of $1,500, for his services and moneys agreed to be paid by him, conveyed the premises to Samuel Coit, who, in consideration of the plaintiff's skill and labor in conducting mining operations thereon, and of moneys advanced by him, executed to the plaintiff another mortgage on said mineral rights to secure the sum of $5,000; that afterward, in 1852, Edward Anthony purchased the premises in behalf of himself and Sanford Coley, Albert W. Wright and Edwin C. Hamilton (who were all made defendants), and received a deed thereof, and that on the 27th of October, 1853, said Anthony and his associates, as parties of the first part, entered into an agreement with the plaintiff, as the party of the second part, the material parts of which are as follows: "Whereas, the parties of the first part are joint owners of certain mineral lands situated in Southampton, Easthampton and Westhampton, in Hampshire county, in the State of Massachusetts, and which said property is now standing in the name of Edward Anthony; and whereas, it is proposed either to sell said mineral lands or to form a joint stock company, for the purpose of working the mines on said lands; and whereas, the parties of the first part have agreed, in consideration of the services rendered and to be rendered by the said Samuel Pinch, that he, the said Samuel Pinch, shall have an interest in the proceeds of the sale of said lands, if the same shall be sold, or, if a joint stock company shall be formed, then that he shall have a certain amount of the stock of the company; now, therefore, this agreement witnesseth that the said parties of the first part, in consideration of the foregoing agreement, and in further consideration of one dollar to each of them in hand paid, the receipt where-

of is hereby acknowledged, hereby agree to pay or cause to be paid to the said Samuel Pinch, his heirs or assigns, out of the proceeds of the sale of said lands, if the same shall be sold, the sum of $6,500; or if the said lands shall not be sold, and a company shall be formed for the purpose of working the mines thereon, then and in that case, to convey or cause to be conveyed unto the said Samuel Pinch, his heirs or assigns, full paid up stock in said company, not liable to assessment, to the amount of $6,500, at the par value of said stock; it being understood and agreed by and between the parties hereto, that of the foregoing amount of $6,500, the sum of $5,000, whether of cash or stock, is to be a charge on the joint estate of the parties of the first part in proportion to their respective interests, and the remaining $1,500 is to be a charge on the separate estate of Albert W. Wright. And the said Samuel Pinch, on his part agrees, in consideration of the foregoing agreements, to remain and continue in the employ of the parties of the first part, so long as they shall require his services, but not exceeding one year from the date hereof for the same salary and compensation that has been heretofore paid to him, to wit: $100 per month, and the house and lands now occupied by him, rent free, and if his services shall not be required for the full term of one year, he hereby agrees to leave the employ of the parties of the first part, and surrender the possession of the house and lands to them at any time, after receiving one month's notice from them."

The bill further alleged that the plaintiff entered the service of the defendants, and continued therein so long as his services were required, and until the filing of this bill, although since 1854 the defendants have abandoned mining operations on said lands; and that he is entitled to maintain a charge and lien upon said lands for the sum of $6,500, and interest from the date of the agreement, and to have the lands sold, and the proceeds applied in payment of his claim.

The plaintiff afterward filed a supplemental bill, alleging that on the 26th of February, 1863, the said Anthony, with a view to the formation of a joint stock company, conveyed the premises to Stephen Hill, Jr., who shortly thereafter conveyed the same to the "Manhan Silver Lead Mining Company," which the plaintiff believes to be a joint stock com-

pany; that since the conveyance to Hill, the plaintiff, at Hill's request, has devoted his attention to the development of said mines, and Hill has frequently assured the plaintiff that there should be a speedy and satisfactory settlement of his claim, but that such settlement has never been made. The plaintiff, therefore, prayed that said Hill and Manhan Silver Lead Mining Company might be made defendants, and that he might have such relief as he might be entitled to in equity. Certain other allegations in the supplemental bill are set forth in the opinion.

After the demurrer filed in this cause had been overruled (see 8 Allen, 536) the defendants filed answers, and the case was referred to a master, who made a report thereon, and the case was reserved for the determination of the whole court. As the decision of the case upon the merits involved no question of law, but rested upon the plaintiff's failure to establish by proof a right to equitable relief, as stated in the opinion, the facts are not here reported.

C. DELANO, for the plaintiff.

G. T. DAVIS, for the defendants.

CHAPMAN, J.

If the plaintiff had any cause of action when he filed his original bill, it arose out of the contract of October 27, 1853. It is necessary, therefore, to ascertain the meaning of this contract; and as the parties construe it differently and its terms are not expressed with fullness and clearness, it is necessary to look into all its parts. Its expressed purpose and the consideration for the defendants' promise will aid us in understanding the promise and giving to it a just interpretation.

The articles of agreement are between Anthony, Hamilton, Coley and Wright, who are called parties of the first part, and the plaintiff, who is the party of the second part. It recites that the parties of the first part are joint owners of certain mineral lands in Hampshire county; that the property stands in the name of Anthony; and that it is proposed either to sell said mineral lands or to form a joint stock company for the purpose of working the mines on said lands.

Having expressed this general purpose, it next recites that the parties of the first part have agreed, in consideration of the services rendered and to be rendered by the plaintiff, that he shall have an interest in the proceeds of the sale if the lands are sold; or, if a joint stock company shall be formed, then he shall have a certain amount of the stock of the company.

The services which are thus referred to are not ordinary services, and his interest in the proceeds of the sale or in the joint stock company is not to be regarded as wages; for it is agreed that he shall remain in the employment of the company as long as they shall require his services, for the same salary and compensation that have been heretofore paid to him, to wit: $100 per month, and the house and lands occupied by him rent free. This compensation was to be paid absolutely, and has been paid. The services referred to in the above recital, to the amount of $5,000 must, therefore, be extra services, and must refer to efforts to sell the lands as mineral lands, or to form a joint stock company by inducing capitalists to join the parties. Parol evidence is admissible to prove what these services were specifically, for the ambiguity in the reference to them is latent.

It appears by the master's report that the plaintiff is an Englishman and acquainted with mining; that he had entered into a correspondence with an English mining journal, and brought to the notice of the proprietors one Richardson, who at their request came to Northampton, and was made superintendent of the mines, and made some effort to sell their mining lands to parties in England. There had been some expectation of making a sale of the lands for a very large profit, and the plaintiff was to continue his efforts to make a sale or form a joint stock company.

We then come to the promise. It is, that "out of the proceeds of the sale of said lands, if the same shall be sold," they will pay, or cause to be paid to the plaintiff, his heirs or assigns, the sum of $6,500; "or, if the said lands should not be sold, and a company shall be formed for the purpose of working the mines thereon," then they will cause to be conveyed to the plaintiff, his heirs or assigns, full paid up stock,

not liable to assessment, to the amount of $6,500, at par value. The land is made subject to a charge for the fulfilment of this agreement to the amount of $5,000, and the separate estate of Wright is made subject to a charge for $1,500, which was not a charge upon the other parties, nor for services rendered to them; and the plaintiff's bill is brought to enforce the lien and compel the specific performance of the agreement.

When the bill was filed, the parties had not sold the property nor procured a joint stock company to be formed for working the mines, although more than seven years had elapsed since the date of the agreement; and the plaintiff contends that he has a right to compel the defendants to make a sale and pay him his money out of the proceeds. The defendants reply that neither they nor the plaintiff have succeeded in selling the lands as mineral lands, nor in procuring capitalists to join them in forming a company for working the mines. They allege that the purchase of their lands and mining rights, and the working of the same have cost them about $35,000, and they have paid considerable sums to Richardson. They have offered their property for sale for $10,000, and have been ready to sell it, and would have sold it for a less price; they have not failed in judgment or diligence in endeavoring to sell the same; but they have never received a cash offer, and the lands have been unsalable for mining purposes, and for other purposes they would not bring the price paid for them. The master's report finds these allegations to be true, and thereupon the question arises whether the defendants were, by the terms of their contract, bound to sell the lands before it should be for the mutual interest of all parties to make such sale. The plaintiff contends that they are bound to sell them at all events after the lapse of so much time. But the court are of opinion that the spirit of the agreement and a just construction of the promise, which is merely contingent, and not absolute, require nothing more than that the defendant should consult the joint interest of all the parties, and that they are not bound by it to disregard their own interest, either in making a sale or forming a joint stock company. When the bill was filed it had not been in the power of the defendants by any reasonable efforts to make

sale of the lands for mining purposes, or to form a company to work the mines, and therefore they had not been guilty of any default or neglect in respect to their agreement. If they had made an absolute sale of the lands, the terms of their agreement would entitle the plaintiff to payment of his claim to the amount received; but if they had made a mere conveyance as one step toward getting up a joint stock company, he would not be entitled either to his money or his stock till the company should be completely organized, and the certificates of stock be ready for delivery to the stockholders. It appears then that at the time of filing the original bill the plaintiff had no cause of action. But the plaintiff afterward filed a supplemental bill setting forth certain facts that had occurred during the pendency of the suit. It is now objected that the facts set forth in this bill can not be considered in this suit, but that this bill should be dismissed, and the plaintiff be left to bring a new suit, if he has good cause of action.

We have found no authority that goes so far as to authorize a party, who has no cause of action at the time of filing his original bill, to file a supplemental bill in order to maintain his suit upon a cause of action that accrued after the original bill was filed, even though it arose out of the same transaction that was the subject of the original bill. It would seem to be contrary to principle to allow this to be done. *Milner* v. *Milner*, 2 Edw. Ch. 114, is an authority against allowing a new cause of action to be stated in a supplemental bill. But the plaintiff may by means of a supplemental bill introduce into his case facts that have occurred since the original bill was filed. The extent to which this may be done is not definitely settled. But if he goes too far in this respect, the defendant has opportunity to object to it when leave is asked to file the supplemental bill: *Pedrick* v. *White*, 1 Met. 76; or by demurrer to the bill for that cause after it is filed. In this case the defendants did demur, but did not present this as a ground of demurrer: 8 Allen, 536. The cause was sent to a master, and was recommitted to him by consent of both parties for the purpose of being fully heard upon its merits, and it has been so heard, and his report embraces every matter that would have been needful if a new bill had been filed.

The objection to the supplemental bill ought, therefore, to be regarded as waived: *Pingree* v. *Coffin*, 12 Grey, 288, 323; Story's Eq. Pl. Sec. 528, and note; *Underhill* v. *Van Cortlandt*, 2 Johns. Ch. 369.

The plaintiff is entitled, therefore, to have his case considered and determined upon the allegations of his bill and supplemental bill taken together.

The original bill sets forth the title to the land and the contract above mentioned; alleges that the plaintiff devoted himself to the service of Anthony and his associates; that the $5.000 constituted a charge upon the lands of Anthony, Coley, Hamilton and Wright; and the $1,500 constituted a charge upon the estate of Wright; avers that he has a right to have the land sold, and the proceeds applied to the payment of his claim, and prays for a sale for that purpose. The supplemental bill reciting certain pretenses which the defendants set up, alleges, that on or about the 26th of February, 1863, Anthony, by his deed of that date, upon certain good and valuable considerations, and especially with a view to the formation of a joint stock company or incorporated association, conveyed to Stephen Hill, Jr. of New York, the mineral lands aforesaid, and that Hill agreed to assume and pay whatever claims the plaintiff should establish in this suit, and save Anthony harmless therefrom; that on or about the 24th of April, 1863, Hill conveyed the lands to a certain company purporting to be "The Manhan Silver Lead Mining Company," for the nominal consideration of $500,000; but whether the consideration is real or not he does not know. He avers that he believes it to be a joint stock company, or incorporated association; that Hill is a member and holds shares in the same and has been active in directing its operations, and has frequently remitted funds to the plaintiff for advancing its operations; that he has devoted his time, at Hill's request, to the development of the mines, and has requested Hill to pay him the money or deliver to him the paid up stock. He makes Hill and the company parties to the bill, and seeks general relief, waiving an answer under oath.

If the plaintiff is entitled to any relief upon these allegations, it should be by a decree for the conveyance to him of the stock

in the Manhan Silver Lead Mining Company to which he is entitled by his contract.

The answer of the defendants admits the conveyance to Hill as alleged, and avers a readiness to pay the plaintiff whatever money or stock he is entitled to. It denies, however, that he has made any demand on them, and on this subject the report finds that no demand has been made, except that within two years after the plaintiff left the service of the original defendants he demanded of them a settlement of his claims. As the case stands, however, this difficulty may be passed over. The answer alleges that the land is not worth more than $7,500, but admits that the capital stock is $500,000, and that this land has been conveyed to the company at that price, thereby making the stock full paid up stock. But by a fair interpretation of the agreement the plaintiff is entitled to stock paid up in cash or its equivalent. This stock is not of that character. It is suggested in argument that the land was put in at this valuation with a view to defraud the plaintiff. But there is no allegation of fraud in the bill, and whether the object was to defraud the plaintiff or to sell the shares for more than their value to other parties does not appear. Nor does it appear that the defendants have proceeded so far in the organization of the company as to entitle the plaintiff to demand his shares, or to make it desirable that he should take them. For aught that appears, the company is so far unorganized as to be unable to take the land as a grantee, and the land may still be in the hands of Hill as an associate of the original parties, and subject to the plaintiff's lien. Neither the pleadings nor the facts stated in the report are sufficient to establish the plaintiff's title to any present relief upon the construction which we have given to the contract.

Bill dismissed without prejudice and without costs.

LUCKHART V. OGDEN ET AL.

(30 California, 547. Supreme Court, 1866.)

Prospecting contract—Executed and executory. Where plaintiffs, mine owners, conveyed an interest in their mines to defendants, in considera-

tion of a contract signed by defendants, to open the mines, etc., it is a contract executed by the plaintiffs, executory by the defendants, and such contract is valid against the defendants, though not signed by the plaintiffs.

Time. Where an executory contract for sale of mines was accompanied by a covenant on the part of the purchaser to open them, and an extension of the time was alleged to be proved by certain letters produced, *held*, that the court must determine as matter of law the effect of such letters, and whether they referred to an extension of all the terms of the contract, or related specially to an extension of time to open the mines only. Second, that an extension of time in general terms would relate to all the terms of the contract.

Reasonable time. A contract for an extension of time being silent as to the duration of such extension, the law implies that it shall be for a reasonable time, and the question, what is a reasonable time, is one of law to be determined by the court from the facts.

Appeal from the District Court of the City and County of San Francisco, Fourth Judicial District.

The following is the contract upon which the action was brought:

"This indenture, made the 31st day of August, in the year of our Lord one thousand eight hundred and sixty-three, between Richard L. Ogden and Paul J. Gifford, of the city and county of San Francisco, parties of the first part, and C. Augustus Luckhart, of the city and county of Los Angeles, party of the second part;

"Whereas, by an instrument in writing bearing date on the 13th day of April, 1863, between J. D. Cusenberry and others, discoverers and sole owners of certain mining ground or property in La Paz Mining District, in the Territory of New Mexico, of the first part, and the said C. Augustus Luckhart of the second part, the said parties of the second part thereto conveyed in fee and absolutely to the said Luckhart, an undivided half of said property, and the said Luckhart, in consideration thereof, agreed in substance to incorporate the parties interested in said property and open the said mines, as will more fully and at large appear by reference to said instrument;

"And whereas, the said Luckhart hath agreed to sell and convey, and by a deed of even date herewith, hath in fact conveyed to the said parties of the first part hereto, the said mining property or mineral ground;

"Now this indenture witnesseth, that the said parties of the first part, for and in consideration of the said conveyance so made to them as aforesaid, do undertake, promise, and agree to and with the said party of the second part, in manner and form following:

"1. They, the said parties of the first part, will, on the part and behalf of said Luckhart, and in his place and stead, perform and fulfill the contract aforesaid between the said Luckhart and Cusenberry, and others, of the 13th of April, 1863.

"2. At any time at or before the expiration of six months from the date hereof, the said parties of the first part having performed the foregoing covenant to that time, they may abandon their purchase, and upon reconveying to the said party of the second part the property by him conveyed to them, unimpaired and unencumbered, with warranty against their own acts, then they shall be thereby discharged from this contract.

"3. At or before the expiration of said six months from the date hereof, the parties of the first part not having abandoned the purchase and reconveyed said property as above provided, shall pay to the party of the second part the sum of three thousand dollars in gold coin of the United States.

"P. J. GIFFORD. [Seal.]
"R. L. OGDEN. [Seal.]"

The other facts are stated in the opinion of the court.

B. S. BROOKS, for appellants.

C. H. PARKER, for respondent.

By the Court, CURREY, C. J.

On the 13th of April, 1863, J. D. Cusenberry and others, the discoverers of certain mines in the La Paz Mining District, in the Territory of New Mexico, conveyed to the plaintiff one undivided half of the property in fee, in consideration whereof the plaintiff covenanted and agreed to incorporate the parties interested in the property and open the mines. On the last day of the month of August, of the same year, the plaintiff conveyed to the defendants his interest in said mining property, in consideration whereof they cove-

nanted and agreed to and with him to perform on his behalf, and in his place and stead, his contract with Cusenberry and others. The contract between the defendants and plaintiff further provided that at any time before six months from the date had elapsed, they might, provided they had at the time proceeded with the performance of their covenant to fulfill the plaintiff's contract with Cusenberry and others, abandon their purchase; and upon reconveying to him the same property unimpaired and unincumbered, with warranty against their own acts, they should be thereby discharged from their contract with the plaintiff; but in case the purchase was not so abandoned, and the property was not so reconveyed to the plaintiff, that they should pay to him the sum of three thousand dollars in gold coin of the United States.

This action was brought on the contract executed by the defendants to recover the sum of three thousand dollars in gold coin, with interest thereon at the rate of ten per cent. per annum from the 1st of March, 1864. The defense to the action is, in substance, that the time for performance of the contract, and also the time within which the defendants had the option to abandon it and reconvey to the plaintiff, was enlarged by the contract between the parties, and that the action was in fact commenced before such extended time had expired, and, therefore, before the defendants were guilty of a breach of their promise to pay the sum of money above mentioned. After the action was commenced, the defendants, acting upon the hypothesis that they had the right to abandon the contract, and reconvey to the plaintiff, executed, acknowledged, and tendered to him a deed in due form, purporting to convey to him the property by him conveyed to them, which deed they brought into court, with their answer, ready to be delivered to the plaintiff.

The case was tried before the court and a jury, who rendered a verdict for the plaintiff for the principal sum demanded in the complaint, with interest thereon from the 1st of March, 1864, upon which judgment was entered. A motion was made on behalf of the defendants for a new trial, which was denied; and the appeal is from this order and also from the judgment.

The evidence in the case showed that after the contract was

entered into between the parties the defendants entered upon their undertaking to open the mine and prosecuted the work feebly for some time on account of the want of the necessary means and supplies for the purpose; and that prior to the expiration of the six months within which they were to make their election whether to proceed to the fulfillment of their engagement, or to abandon it, they, in anticipation of their inability to complete the work within that period, applied to the plaintiff for an extension of time, and at the same time informed him that unless it was granted the defendants would be compelled to avail themselves of the election which they had reserved of abandoning the enterprise; accordingly, an extension was granted, but no term thereof was agreed upon. About the middle of April, 1864, the defendant Gifford, who had been at the mine, visited the plaintiff at his residence, at Los Angeles, and, after having given him an account of affairs at the mine, applied for another extension. Gifford testified that he told the plaintiff it was necessary the defendants should have six months or a year more, and that unless he gave it they would be compelled to abandon the contract and reconvey; and that in reply the plaintiff said he did not wish them to reconvey, and if they would not, he would give them all the time they wanted. That he was intending to go to San Francisco and would see both defendants and make everything satisfactory. That the parties with whom he had contracted (evidently referring to Cusenberry and others) would do anything he agreed to. The plaintiff testified on his own behalf, giving a different version of the conversation respecting which Gifford testified. He admitted that Gifford applied for an extension of the time in which to perform the contract, and that he made a proposition to Gifford to enable him, the plaintiff, to assist the defendants in obtaining such extension. The proposition was that Gifford should furnish the plaintiff with sufficient means to enable him to proceed to San Francisco, which it was necessary he should do in order to obtain from Cusenberry and others an extension of the time within which he, the plaintiff, was bound by his contract with them to perform the work of opening the mine; and he says he told Gifford that if he could go to San Francisco he would make it "all right—satisfactory to all par-

ties." To which Gifford made no definite answer. It does not appear that Gifford furnished the plaintiff any money to enable him to proceed to San Francisco. After the plaintiff had thus stated, Gifford was recalled, and on behalf of defendants testified that at the conversation mentioned the plaintiff did not make it a condition of his proceeding to San Francisco that he, Gifford, should furnish money to pay his expenses; but he added that the plaintiff said he had no money to pay his expenses, and asked this witness to let him have some—that he had no money and could not go to San Francisco unless he could get the money from him, Gifford, for the purpose. This, in fact, is in corroboration of what the plaintiff testified. The plaintiff, it seems, expressed a willingness on his part to extend the time for the fulfillment of the contract on the part of the defendants, but in order to be able to do so, he told Gifford of the necessity of seeing Cusenberry and others, to whom he was bound, and for that purpose that he must visit San Francisco, and in order to do so, he required means, which he asked Gifford to furnish, but which were not furnished. We are clearly of the opinion that the evidence of what passed between the parties in April, at Los Angeles, does not prove an agreement to extend or enlarge the time for the performance, on the defendants' part, of the work they had by their contract undertaken to do.

After the plaintiff had introduced in evidence the contract between the parties and rested, the defendants moved the court to grant a nonsuit, on the grounds—first, that the plaintiff had proved no contract between the parties; second, that he had proved no breach of the contract; and third, that he had proved no demand of the money before bringing the action. The motion was denied, and the defendants excepted.

An executory contract.

I. The reason assigned in support of the first ground of the motion for a nonsuit was that the contract was not executed by the plaintiff. The execution of the contract was not denied by the defendants, but expressly admitted; but the objection raises the question of its validity, because it

was executed by only one of the parties to it. The answer to this objection is, that the consideration for the defendants' covenants contained in the contracts executed by them was rendered and performed by the plaintiff by the conveyance to them of his interest in the mine, and thus was completely executed, while on their part the consideration for such conveyance was still to be rendered and performed, and thus was executory. The contract did not provide for the performance of anything by the plaintiff, and therefore it was not necessary he should sign it. The judgment of the court is that the contract was well executed.

Extension of time to perform a contract—Proof of.

II. The plaintiff sued upon the contract as written, and alleged that by its terms and conditions there was due him three thousand dollars in gold coin of the United States, with interest thereon from the 1st of March, 1864. By the contract, the defendants promised to pay the plaintiff the principal sum named at the expiration of six months from the date thereof, in case the purchase was not abandoned and the property reconveyed, and by the complaint it was alleged that the defendants had not so abandoned and reconveyed, nor had they paid said sum of money or any part of it. The defendants did not deny the execution of this contract or sufficiently deny any material allegation of the complaint; but they plead two extensions by the plaintiff of the time for them to perform it or elect to abandon their purchase and reconvey the property. The execution of the contract being admitted, there was nothing on the part of the plaintiff to prove in order to establish a breach of the promise of the defendants therein contained to pay the sum stipulated, as the six months specified, and a much longer time, had elapsed prior to the commencement of the action. To show that the time for performance and election was enlarged and unexpired was upon the defendants. When the plaintiff rested, his case was made out, and the burden was then upon the defendants to overthrow it, by proof of the facts pleaded on their part, in avoidance of the breach alleged, and therefore we are of opinion the objection made as the second ground for a nonsuit, to the

effect that there was at that stage of the case no proof of a breach of the contract, was not well founded.

III. The third ground on which the court was asked to nonsuit the plaintiff we do not consider tenable. The bringing of the action was all the demand that the plaintiff was bound to make for the sum of money which the defendants agreed to pay him.

Extension of time to perform contract.

IV. After the motion for a nonsuit was denied, the parties produced evidence. Several letters which passed between the defendants and plaintiff were introduced, in reference to an extension of time to the defendants upon the contract which they had executed to the plaintiff. Early in December, 1863, Gifford wrote to the plaintiff, in which he spoke of his ill luck in opening the mine, stating at the same time in substance that he wanted an extension of time on the agreement which the defendants had executed to the plaintiff, and that unless he could obtain it, he would have "to throw the contract up." The plaintiff replied to this letter, agreeing to the extension requested. On the trial, the plaintiff admitted that the letters named constituted a "valid extension of the time mentioned in the contract." No particular term of extension was specified. Where, in such cases, the contract is silent as to the duration of the extension, it must be presumed the parties intended a reasonable time, and this the law will imply. In argument, the plaintiff's counsel maintains that the agreement enlarging the time mentioned in the contract did not amount to an enlargement of the time within which the defendants might elect to abandon the purchase and reconvey the property, but only an extension of the time for the performance of the contract to open the mine, which they had assumed.

The court must determine the meaning of a contract.

What the agreement meant was for the court to decide, and we are of opinion the extension of time for which the parties stipulated applied to the entire contract—that the defendants were entitled not only to a further reasonable time in which to perform the work they had engaged to do in

opening the mine, but were in the meantime entitled to abandon their purchase and reconvey the property to the plaintiff, as stipulated in the contract, provided that when so electing, they had to that time proceeded with due diligence in the performance of the plaintiff's contract with Cusenberry and others, as they had contracted to do. The defendants' counsel at the trial seemed to entertain this view of the agreement which had been entered into extending the time mentioned in the contract between the parties, and accordingly requested the court to instruct the jury:

"*First.* That the letters from Gifford to Luckhart, and from Luckhart to Gifford and Ogden contain a valid contract between the parties to extend or prolong the original contract.

"*Second.* The effect of the contract was to continue all the rights of the parties just as they were at the moment of the new contract for a reasonable time thereafter to perform the work contemplated."

The court refused to give these instructions; but submitted it as a question of fact to the jury to find whether there was an extension of time after the contract between the plaintiff and defendants was made, and if so, what was that extension of time? Was it an extension of time for the development of the mine, or was it for the purposes embraced within the contract? Matters of fact dependent upon the finding as to the above questions in the affirmative were also submitted for the determination of the jury. Whether the jury under the general charge above noticed found the matters submitted in the affirmative or negative we have no means of ascertaining. If they determined these questions in the negative, then it became wholly unimportant to consider the dependent matters submitted. It was the duty of the court as already indicated to determine the effect of the agreement in relation to enlarging the time mentioned in the contract, and for this error the judgment must be reversed, and a new trial granted.

Is the court or jury to determine the issue of what is reasonable time to perform a contract?[1]

V. The agreement evidenced by the letters being an en-

[1] See, as to when a question of law, *Patterson* v. *Hitchcock*, 3 Colo. 533; *Post* ESTOPPEL.

largement for a reasonable period of the term for the complete performance of the contract on the part of the defendants, or to make effectual their abandonment of the purchase, it becomes necessary, as the case must be remanded for a new trial, to pass upon the question whether it was for the court or jury to determine the issue involved in this point. The court, in submitting it to the jury, left to them to decide the question of what constituted a reasonable time in which the defendants might perform their contract or elect to abandon their purchase and reconvey the property to the plaintiff, under the agreement extending the time for that purpose. In several cases cited by the defendants' counsel, it is laid down as the rule of law that what is a reasonable time within which a contract must be performed when it is silent on the subject, is a question of law: *Attwood* v. *Clark*, 2 Me. 249; *Kingsley* v. *Wallis*, 14 Me. 57; *Howe* v. *Huntington*, 15 Me. 350; *Hill* v. *Hobart*, 16 Me. 168. In the case last cited the court say: "Where the facts are clearly established or are undisputed, or admitted, reasonable time is a question of law. But where what is reasonable time depends upon certain other controverted points, or where the motives of the party enter into the question, the whole is necessarily to be submitted to the jury before any judgment can be found, whether the time was or was not reasonable." Ordinarily it is a matter of no difficulty to ascertain whether a particular question be one of law or of fact. But in the class of cases involving questions of reasonable time, reasonable care, due diligence, and the like, it often happens that some general conclusion is to be drawn from a variety of facts and circumstances appertaining to the particular case. Upon this subject Starkie says:

"The law can not prescribe in general what shall be reasonable time by any defined combination of facts, so much does the question depend upon the situation of the parties and the minute and peculiar circumstances incident to each case. If a man has a right by contract or otherwise to cut and take crops from the lands of another, the law, it is obvious, can lay down no rule as to the precise time when they shall be cut and removed; all that can be done is to direct or to imply that this shall be done in a reasonable and convenient time; and this must obviously depend on the state of the weather and other circumstances, which can not from their nature

form the basis of any legal rule or definition." Stark. on Ev. 769.

The term reasonable time is a technical and legal expression, which in the abstract involves matter of law as well as matter of fact. Whenever any rule or principle of law applies to the special facts proved in evidence and determines their legal quality, its application is matter of law. But whenever the special facts and circumstances are such that the court can not by the aid of any legal rule or principle decide upon the legal quality of the facts, it is necessary that the jury should draw the inference in fact, with reference to the ordinary course and practice of dealing, and the general principles of morality and utility. Where the law itself prescribes what shall be considered to be reasonable time in respect to a given subject, the question is one of law, and the duty of the jury is confined to finding the simple facts. Where, on the other hand, the law "does not, by the operation of any principle or established rule, decide upon the legal quality of the simple facts, or *res gestæ*, it is for the jury to draw the general inference of reasonable or unreasonable, in point of fact. In such cases, the legal conclusion follows the inference of facts; in other words, the question as to reasonable time, etc., is one of fact, and the time is reasonable or unreasonable, in point of law, according to the finding of the jury in point of fact." Stark. on Ev. 774.

In *Cocker* v. *The Franklin Hemp and Flax Manf. Co.*, 3. Sum. 532, the question of reasonable time for the performance of a contract which was silent on the subject was considered by Mr. Justice STORY, in submitting the case to the jury, and he left it to them, after laying down the rules by which they should be governed, to determine from the evidence the reasonableness of the time allowed to be necessary for the performance of the contract undertaken. In his summing up to the jury, the learned justice referred with approbation to the case of *Ellis* v. *Thompson*, 3 Mees. & W. 445, in which Baron Alderson, in speaking of a contract for the delivery of goods, which contained no specification as to the time when the delivery should be made, said for that reason the law would imply that the delivery should be made within a reasonable time, and that what was a rea-

sonable time was a question for the jury at the trial. See also *Fry* v. *Hill*, 7 Taunt. 397; *Doe* v. *Sandham*, 1 T. R. 705; *Facey* v. *Hurdom*, 3 B. & C. 213; *Pitt* v. *Shew*, 4 B. & Ald. 208.

In the case under consideration, the question of what time was necessary and reasonable to be allowed the defendants to open the mine, or to elect to abandon the purchase after having faithfully and diligently prosecuted the work for that purpose, depended upon a variety of circumstances, and could only be determined by the jury under the instructions of the court as to the principles of law which must be observed by them in coming to a verdict.

The judgment is reversed and a new trial ordered.

TOWNSEND ET AL. V. PEASLEY.

(35 Wisconsin, 383. Supreme Court, 1874.)

Statute of frauds—Oral agreement to contradict written lease. By a deed of indenture, defendant leased to plaintiffs certain mineral lands adjoining his own "diggings," and as a consideration therefor, plaintiffs covenanted to work the tracts of land demised to them in a good and miner-like manner, "and to use such machinery as might be necessary to unwater and work said tracts or mines, and to pay as rent" to defendant one sixth part of the mineral raised by them. In the present case the plaintiffs sue upon an alleged *oral* agreement, entered into on the day before said deed or lease was executed, but on the same day that the terms thereof were agreed upon; by which alleged oral agreement plaintiffs were to put a pump into the grounds then being worked by them (being the same lands let to them by said lease) and to drain the water from defendant's "diggings" and defendant was to pay them therefor one sixth of the mineral which he might take out of his "diggings" below the line at which the water would stand if the ground were not so drained by plaintiffs' pump. *Held*, that the alleged *oral* agreement was merely in the nature of one to pay plaintiffs for services performed on defendant's land, and did not create any interest in such land, and was, therefore, not void by the statute of frauds. *Held*, further, that as it is not claimed that plaintiffs have done anything more by the use of their pump, than to "unwater" the lands leased to themselves, the benefits to defendant's adjoining mine being merely *incidental* to this, evidence of such oral agreement tended in effect to prove an additional and different consideration from that named in the

lease for unwatering their mines as there stipulated, and such evidence was inadmissible.

Appeal from the Circuit Court of La Fayette County.

The complaint alleges that on or about the 25th of November, 1870, the plaintiff, Absalom A. Townsend, and one Addison A. Townsend, were engaged in mining for lead ore on certain land in the town of Shullsburg, in said county, and the defendant was the owner or occupant of certain adjoining land; that defendant, being desirous of mining for mineral on his said land below the common water level, then entered into an agreement with said Absalom A. Townsend and Addison A. Townsend, by the terms whereof defendant agreed with them that if they would put a pump on the grounds then worked by them, and run a drift or level to defendant's ground, for the purpose of draining the water from defendant's land as far as practicable, he (defendant) would pay them one sixth of all the mineral or proceeds thereof raised by him, or which might thereafter be taken out by him from the ground below the common water level, by reason of the draining of the water as aforesaid from defendant's said land; that in consideration of this agreement of defendant, said Absalom A. and Addison A. Townsend agreed to put a pump on their ground as aforesaid, and to run said drift or level as soon as practicable; that they did put the pump on their ground, sank the pump shaft deeper, and ran said drift or level as agreed; that the same drained and continues to drain or lower the water below the water level in defendant's said land; that by reason of such draining, defendant has taken out from his said ground, since April 14, 1871, a large quantity of mineral or lead ore, and has sold the same or the greater part thereof, but has refused to pay one sixth of the mineral so taken out by him, or the proceeds thereof, though often requested so to do; that the value of said one sixth was $200, and that, before any of said mineral was taken out, Addison A. Townsend, "sold and conveyed all his interest in the said one sixth of the mineral that might be raised as aforesaid by defendant" to the plaintiff, Walter B. Townsend. Plaintiffs therefore demand judgment for said sum of $200. The answer was a general denial.

At the trial, defendant objected to the admission of oral evidence to establish the contract set up in the complaint, on the ground that it was a contract for an interest in the realty; but the objection was overruled. It appeared that on the same day on which the verbal agreement here sued on is alleged to have been made, the same parties agreed verbally upon the terms of a written lease by which defendant was to lease to plaintiffs the land referred to in the complaint as lands worked by the plaintiffs, and that this lease was reduced to writing and executed on the next day. By the terms of this lease (which was put in evidence), the lessees agreed "to work the said tracts of land in good and miner-like manner, and to use such machinery as might be necessary to unwater and work said tracts or mines, and to pay as rent to said first party (Peasley) one sixth part of the minerals raised, or caused to be raised, on said premises," by said lessees, "and to work said mine constantly, and not to discontinue work more than ten days at any one time without the consent of said first party," etc. The instrument recites that the consideration for the making of the lease to Peasley is "the covenants and rents" thereinafter mentioned; and there are no covenants therein on the part of the lessees except those above stated.

The remainder of the evidence, which was voluminous, need not be stated here.

The court instructed the jury that the only material questions of fact were: first, whether any such contract as that alleged by the plaintiff was actually entered into by the parties; and secondly, whether the mineral, one sixth of the value of which was sued for in this action, was actually unwatered by plaintiffs' horse pump, under such oral contract.

Verdict for the plaintiffs, for $160 damages. A new trial was denied, and defendant appealed from a judgment on the verdict.

COTHREN & LANYON, for appellant.

ORTON & OSBORN, for respondents.

COLE, J.

We are inclined to agree with the counsel for the plaintiffs,

that the contract sued on was not void under the statute of frauds. It is claimed that it created an interest in the realty and in the products of the soil for an indefinite period, and must therefore be in writing, in order to be valid. The contract as set out in the complaint and attempted to be proven at the trial, was, in substance, that if the plaintiffs would put a pump on the ground then being worked by them, and drain the water from the diggings which the defendant was working, the defendant agreed to give or pay one sixth part of the mineral which he might take out below where the water would have stood had not the ground been drained by the plaintiffs' pump. The counsel for plaintiffs insist that this contract does not create an interest in lands, within the meaning of the statute of frauds, but is essentially the same as any other contract for the performance of services upon the real estate of another; like the erection of a building, digging a well, or building a fence. If the analogy between this contract and one to perform labor on the land of another be correct, and we confess we are unable to perceive any distinction in the two cases, then it is very apparent that the statute does not apply to it: *Frear* v. *Hardenbergh*, 5 Johns. 271; *Lower* v. *Winters*, 7 Cowen, 263. It does not create an interest or estate in lands, but only provides the amount of compensation which the plaintiffs were to receive for the services which they were to perform, namely, drain the water from the ground upon which the defendant was mining. It is true, the plaintiffs call this one sixth of the mineral which they were to receive, "rent," but this is evidently an inaccurate use of that word. It was more properly the measure of compensation which they were to receive for draining the defendant's mines. It was not otherwise than an agreement to pay so much money for the services which the plaintiffs were to perform. So we should feel constrained to overrule the objection that the promise of the defendant was within the statute, if this were the only difficulty in the way of a recovery; but it is not so.

On the same day that this parol agreement was made, the parties made a contract by which the defendant leased to the plaintiffs a certain portion of his lands, defined by metes and bounds, for mining purposes. This lease was

reduced to writing and executed by the parties on the next day after the alleged contract sued on, is said by the plaintiffs to have been made. As a consideration for the lease, the plaintiffs covenanted and agreed to work the tracts of land demised in a good and miner-like manner, "and to use such machinery as may [might] be necessary to unwater and work said tracts or mines; and to pay as rent to said first party," one sixth part of the mineral raised by them. Now it seems to us the effort is to prove a parol agreement which really relates to the subject-matter of the written lease, and in effect adds an additional consideration for the covenants of the plaintiffs as there contained. The parol contract is essentially a part and parcel of the agreement which was reduced to writing, and which, upon well-settled principles, we must assume contains the final stipulations of the parties. It is not claimed that anything was omitted from the written lease through fraud or mistake. It seems that the lease was drawn by Addison A. Townsend (a son of one of the plaintiffs), the next day after the terms of the lease were agreed upon, and after the making of the alleged parol contract to pay the one sixth part of the mineral which should be raised by the defendant from his ground drained by the plaintiffs' pump; and he says that he asked the parties at the time if the written contract "*had all in it*," and that they were satisfied with it. The written lease provided that the plaintiffs should use such machinery as might be necessary to unwater "and work said tracts"; and it is not claimed that they have done any more than drain the water from their own mines by the pump which they have used. If the plaintiff stipulated for compensation for a benefit which would result incidentally to the defendant from their doing what the lease contemplated they should do, this condition should have been incorporated in the written instrument. For it was a part of the consideration for the covenants there entered into, if ever such a stipulation was made.

The counsel for the plaintiffs contends that the parol contract was not merged in the written lease, but was an entirely distinct and independent agreement. But it seems to us that it related to the same subject-matter, and can not be separated from it. We can not see how the case would be different if

the defendant were to insist upon his right to prove by parol that the agreement was that he was to have a one fourth part of the mineral raised by the plaintiffs, instead of the one sixth stipulated for in the lease. With equal reason it might be claimed that the defendant could show another and separate contract in regard to the amount of rent to be paid by the plaintiffs, as that the plaintiffs may show that the consideration for the performance of the covenants on their part was something different from that mentioned in the lease. The evidence in both cases is to be excluded, under the rule recognized and enforced by all the authorities on the subject, that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a written instrument." Of course the intelligent counsel for the plaintiffs does not question the entire correctness of this rule of evidence, but he contends that it is not applicable to the case before us. He insists that the subject-matter of the two contracts is distinct and different, and that the previous parol contract by which the defendant agreed to pay the value of one sixth of all the mineral which he should raise from ground drained by the plaintiffs' pump, was not merged in the written lease subsequently executed.

But it seems to us this view is untenable, and that we must assume that the written lease contains the whole engagement of the parties in regard to draining and working the ground. The plaintiffs would have the court infer that they were to be paid an additional compensation to that mentioned in the lease, for "using such machinery as may be necessary to unwater and work said tracts or mines"; in other words, that a parol contemporaneous contract was made, by which they were to be paid another and additional consideration from that mentioned in the written instrument, for an advantage which might result to the defendant from a performance of the covenants they had undertaken to perform. This is really substituting a new and different contract for the one the parties entered into; and we think all the evidence relating to this parol contract should have been excluded from the consideration of the jury. The fact that no such agreement was inserted in the lease, affords a conclusive presumption that it was not in accordance with the final understanding and engagement of the

parties. On the trial the court held that this parol contract might be shown, and in various ways ruled contrary to these views.

We therefore think the judgment must be reversed, and a new trial ordered.

BY THE COURT.—So ordered.

LEAVERS v. CLEARY ET AL.

(75 Illinois, 349. Supreme Court, 1874.)

Benefit of working shaft confined to lands of party sinking it. The owners of coal lands entered into a contract by which they sold all the coal under such lands to a company, which company were bound to sink a shaft 230 feet for coal. At the same time they conveyed to the company ten acres of the land for about half its value. If a good vein was found within the 230 feet the company were to keep the land and pay a royalty of ten cents on each ton raised. If no such vein was found, they were to reconvey the land and the owners were to refund the cost of sinking the shaft.

Coal was found and worked for some time, after which the company sold the land to another party, who began to drive a gallery to reach other coal of his own, intending to no longer work the lands of the parties who had caused the shaft to be sunk. The purchaser had notice of the contract. *Held*, that the intention of the parties was that the mining should be confined to the lands embraced in the contract, and the defendant was rightly enjoined from working other coal through said shaft.

Construction of parties followed by courts. The construction given to a contract by the parties themselves, as shown by their acts under it, may be resorted to in determining the original intent at the time the contract was executed.

Writ of error to the Circuit Court of Livingston County; the Hon. CHARLES H. WOOD, Judge, presiding.

Mr. A. E. HARDING and Mr. L. E. PAYSON, for the plaintiff in error.

Messrs. STREVELL & GARATT, for the defendants in error.

Mr. Justice CRAIG, delivered the opinion of the court.

This was a bill in equity, brought by Ann Cleary, and

William Cleary, her husband, in the Circuit Court of Livingston County against William H. Leavers to enjoin him from mining coal from certain lands not embraced in a certain contract entered into between his grantor and William Cleary.

It appears from the record that on the 30th day of May, 1865, Ann and William Cleary, being the owners of certain coal lands in Livingston county, entered into a contract, in writing, with the Pontiac Coal Company, by which they sold all the coal, coal oil and other minerals contained in the lands to the company. The contract contains a provision that about ten acres of the land should be conveyed to the company for the sum of $1,984, which was about one half the real value of the land. The coal was, however, reserved.

The company agreed to sink a shaft, for the purpose of mining the coal contained in the land, to the depth of 230 feet; the Clearys, however, guaranteed that a vein of coal would be found under the land not exceeding the distance, specified in the contract, which the shaft was required to be sunk, of sufficient thickness and of such quality as to justify the mining of the same.

In the event that coal was not found as provided in the contract, then the land was to be reconveyed, the money refunded, and in addition, the Clearys were to pay the company the entire expense of sinking the shaft.

The company agreed, in the event coal was found as specified, to pay the Clearys ten cents per ton for all coal taken from the mine.

The deed mentioned in the contract was executed and delivered; the company sunk the shaft, and at the depth of 175 feet found a vein of coal four feet six inches thick, of good quality.

The company proceeded to mine the coal under the contract, and continued operations, accounting to complainants for all coal mined, at the price agreed upon, until the year 1872, when the defendant acquired the title of the company in the contract, and lands conveyed, and took possession of the mine.

He mined from the lands a large quantity of coal, and raised it from the shaft, but refused to pay the stipulated price to the complainants.

It further appears that a short time before the filing of the bill the defendant acquired other coal lands adjoining those embraced in the contract, employed a large force of hands, and commenced cutting through the vein of coal between the lands so acquired and the lands named in the contract, a distance of 30 or 40 yards, with the intent and purpose, as soon as he reached the coal on the leased land, to abandon the coal mine named in the contract, and work exclusively on the mine in the leased land, but raise all coal mined through the shaft sunk in the land embraced in the contract.

The object the defendant had in view was to avoid the payment to complainants of the ten cents per ton which they were entitled to receive under the contract.

The only question presented by the record arises on the construction to be placed upon the contract entered into between complainants and the coal company.

In placing a construction upon the contract, the intent and understanding of the parties, at the time it was executed, is an important element to be determined and considered.

The defendant acquired the interest the coal company had in the lands, with full notice of the contract between complainants and the company; he is, therefore, standing in the shoes of the coal company; his rights, duties and obligations are to be measured by those of the coal company, and are to be governed by the contract entered into by complainants and the company.

When, therefore, the defendant commenced working the mine, he was bound to run it in the same manner, and account to the complainants for all coal raised, at the same rate that was required of his grantor. It will be observed that in entering into the contract the complainants parted with valuable property, and incurred a heavy liability.

They parted with all the coal and minerals in the lands, conveyed ten acres absolutely for one half its value, gave a guaranty that coal would be found, under a penalty to pay the entire expenses of sinking the shaft, if coal in quality and quantity to justify working was not found.

What consideration were complainants to receive for the liability incurred, and the property they transferred?

The consideration was, the agreement of the coal company

to work a shaft on the lands, mine the coal, and pay ten cents per ton for all coal raised from the mine.

It was obviously the intent of the parties that the mining should be confined to the lands embraced in the contract; no allusion is made to mining elsewhere; at the time the contract was made, it does not appear that the company had, or ever expected to have, any interest in lands adjoining those embraced in the contract.

It is unreasonable to suppose that the complainants would have consented to part with valuable property at half its value, and assumed the responsibility of refunding the entire expense of sinking the shaft, if the coal company had the right, the moment coal was found, to cut an entry from the shaft to adjoining lands, abandon the coal for which complainants were to receive ten cents per ton, and use the property conveyed and the shaft for the sole purpose of mining coal from other lands, from which complainants would receive no profit.

Such a construction of the contract would be unreasonable, and would require complainants to sacrifice their property, and receive nothing in return.

By reference to the contract, a clause will be found, in the language following: "And it is further agreed between the parties to this contract, that the said party of the second part is to work a shaft for the purpose of mining coal."

The shaft was required to be sunk on the land embraced in the contract. Where did the parties to the contract intend that the mining should be done? No lands are spoken of, or in any manner alluded to, except those embraced in the contract; those lands, and no other, were the subject-matter of the contract, and the conclusion is irresistible, that the parties intended that the mining should be confined to the lands embraced in the contract.

The construction the parties to the contract placed upon it themselves for seven years, by mining the lands named in the contract, and paying the stipulated amount per ton, during which time it is neither claimed nor insisted upon that the right exists to cut across the line, where coal might be obtained at a lower rate, may be resorted to as a means of determining the true intention of the contracting parties at the time the contract was executed: *Lunn* v. *Gage*, 37 Ill. 19.

While it is true, it is no part of the duty of courts to make contracts for parties, yet, in placing a construction upon a contract, it is proper to scrutinize the language used, and determine the intention, and then place that construction upon the contract which will carry into effect and enforce that intention.

We are fully satisfied that it was not within the design or contemplation of either party to the contract involved in this case, that the land and shaft embraced in the contract should be used for the purpose of mining coal from other or different lands than those mentioned in the contract; and when the defendant undertook to run an entry from the shaft to other lands, for the purpose of mining in such lands and raising the coal through the shaft, he was violating the spirit of the contract, and seeking an undue advantage of complainants, which it was proper for a court of equity to restrain him from doing.

The decree of the circuit court will therefore be affirmed.

Decree affirmed.

WHEELER ET AL. v. THE FLORAL MILL AND MINING COMPANY.

(9 Nevada, 254. Supreme Court, 1874.)

[1] **Quartz mill subscription.** Certain persons subscribed money to build a quartz mill in which all the subscribers were to be interested, and the money was to be paid in such manner and at such times as the majority of the subscribers might order. *Held*, not to be a subscription for the benefit of any particular person or corporation, but for the mutual benefit of all the subscribers.

Pleading a conclusion of law. An averment that certain persons became subscribers to the capital stock of a corporation by signing and delivering an agreement is not a statement of fact, but a mere conclusion of law.

Mutuality in subscription. A subscription to the erection of a quartz mill can be recovered only upon pleadings showing a mutuality between the parties, and that the conditions of the subscription have been complied with.

Void counter claim. A finding that an offset pleaded by defendant is a

[1] See *Kimmins* v. *Wilson*, Ante, 159.

"proper matter of offset" will not be presumed correct if there are no averments in the answer to base such a finding upon.

Appeal from the District Court of the Seventh Judicial District, Lincoln County.

This was an action commenced by Frank Wheeler and George W. Arnold, composing the firm of Frank Wheeler & Co., against the defendant, for the purpose of foreclosing a mechanic's lien for hardware, sold and delivered, amounting to seventeen hundred dollars and upward. A number of other lien-holders intervened and set up their claims. The decree was in favor of the plaintiffs and intervenors foreclosing the respective liens; but in the case of the plaintiffs' claim there was a set-off of one thousand dollars allowed, reducing the judgment on their lien to $766.30. Wheeler & Co. appealed from the judgment.

A. B. HUNT, for appellants.

THORNTON & KELLEY, for respondent.

By the Court, HAWLEY, J.

Respondent is a corporation, and in this action claimed and obtained an offset of $1,000 against the mechanic's lien sought to be foreclosed by appellants. The agreement under which the offset was claimed and allowed, reads as follows:

"Whereas, it has been proposed to build a quartz mill at Pioche, Lincoln county, State of Nevada (to be situated within the limits of said town of Pioche), the capacity of said mill being ten stamps with furnace, all complete in working order; and whereas, it is proposed to have the citizens of Pioche, whether in their capacity as miners, mechanics, or others, to hold an interest in the ownership of said mill, it has been decided to receive subscriptions for the carrying out of the enterprise, in such manner and method as a majority of the subscribers hereto may elect; and whereas, the sum of fifty thousand dollars in gold coin will be the utmost limit of amount of money desired for the enterprise, we, the undersigned, do hereby agree and promise to pay the several sums set

against our names toward the amount desired, and in such manner and at such times as the majority of the undersigned may order. Pioche, May 30, 1873.

FRANK WHEELER & Co., - - - - $1,000."

This agreement was signed by sixteen others, and the subscriptions amounted in the aggregate to $35,000. It was not signed by respondent. It is apparent upon the face of this agreement that the subscribers were to have an interest in the mill; it was to be of the capacity of ten stamps; was to be built within the limits of the town of Pioche, and was not to cost over $50,000. The subscribers were to meet after the subscriptions were obtained and a majority were to elect the manner and method in which the proposed enterprise was to be carried out.

It will be observed that appellants did not undertake to pay "The Floral Mill and Mining Company," nor any particular person or corporation, the amount of their subscription. It was not a subscription for the benefit of another, but for the mutual benefit of all the subscribers. As a safeguard, it was provided that a majority of the subscribers should designate the manner, and direct the method, in which the enterprise was to be conducted. Whether they were to proceed by acts of incorporation, or otherwise, is not expressed in the agreement, and the respondent has failed to allege any fact connecting itself with the subscribers. The averment that appellants became subscribers to the capital stock of respondent "by signing and delivering" said agreement, is not a statement of any fact, but a mere conclusion of law. The only other averment in the answer tending to connect respondent with the subscribers, to wit, that "the majority of the said persons who signed said agreement, ordered that the several sums therein specified and set against the names of the said signers should be paid to the said company (respondent) on demand" is insufficient. The answer fails to state what interest, if any, the appellants were to have in the property. It does not give the capacity of the mill, nor state its cost; nor does it appear therefrom that the majority of the subscribers ever decided the manner and method "for the carrying out of the enterprise." In fact, there are no averments in the answer sufficient to show any mutuality between appel-

lants and respondent, or that the terms of the agreement have been complied with. Unless such facts are alleged and proved the respondent is not entitled to recover the amount of appellants' subscription: *Goff* v. *Winchester College*, 6 Bush, Ky. 444; *Machias Hotel Company* v. *Coyle*, 35 Maine, 410; *Atlantic Cotton Mills* v. *Abbott*, 9 Cush. 425; *Dalrymple* v. *Lauman*, 23 Md. 399; *Berry* v. *Yates*, 24 Barb. 202. The court found as a fact, that the offset pleaded by respondent was a "proper matter of offset"; but we can not presume that this fact was properly found, because there were no averments in the answer to base such a finding upon: *Barron* v. *Frink*, 30 Cal. 489; *Burnett* v. *Stearns*, 33 Cal. 473.

The judgment allowing the offset of $1,000 is reversed and the cause remanded for a new trial.

Judgment reversed.

THE CARONDELET IRON WORKS v. MOORE ET AL.

(78 Illinois, 65. Supreme Court, 1875.)

[1] **Option—Time.** M. contracted for the purchase of iron manufactured by the C. I. Works, but reserved the right to reject all white and mottled iron in excess of ten per cent. of the quantity of gray mill iron. *Held*, that such an option must be exercised within a reasonable time or the right be lost; and that a complaint as to the quality of the iron made nearly a year after M. had full opportunity to examine the iron, and after it had been weighed and paid for and M. had assumed control of it, was not within a reasonable time.

Warranty. A mere statement in a bill rendered regarding the quality of iron can not be relied upon as a warranty of its quality. While no particular words are necessary to make a warranty, such expressions must be used as to show an intention of the party to bind himself by the representations made.

[2] **Fraud.** The plaintiff can not recover on the ground of fraud when, before the bill was rendered, he had every opportunity to inspect the iron, and no concealment was used or representation made to induce the plaintiffs to believe that the iron was of any particular grade, or to prevent an examination into its quality.

Writ of error to the Circuit Court of St. Clair County.

[1] See *Luckhart* v. *Ogden*, Ante, 602.

[2] *McAleer* v. *McMurray*, 58 Pa. St. 126; *Post* FRAUD.

HITCHCOCK, LUBKE & PLAYER, and G. & G. A. KOERNER, for the plaintiff in error.

NOBLE & ORRICK and UNDERWOOD & NORTLING, for the defendants in error.

CRAIG, J.

This was an action of assumpsit, brought by Geo. S. Moore and George D. Morris, partners, composing the firm of Geo. S. Moore & Co. against the Carondelet Iron Works, in the Circuit Court of St. Clair County.

The declaration contained two counts. The first, for money had and received; the second set out a written contract entered into between the parties, under which the Iron Works had sold plaintiffs the entire product of all iron manufactured at its furnace during a specified time, at a certain price, and concludes with an averment that, on, to wit, February 12, 1873, the defendant knowingly and falsely pretended and warranted that it had manufactured for the plaintiff 610 tons of mill iron, and piled the same in the yard of defendant for the plaintiffs, and the plaintiffs, relying upon the truth of the representations and warranty, paid $45 per ton for the same, being the sum of $27,450; when, in fact, none of said iron was mill iron, as represented and warranted, but all of the same was white mottled iron, an article of inferior value.

To the declaration, the defendant pleaded the general issue. A trial was had before a jury which resulted in a verdict in favor of the plaintiffs, for $14,228. The court overruled a motion for a new trial, and rendered judgment upon the verdict, to reverse which the defendant has brought the record here by writ of error.

The contract entered into between the parties in regard to the iron, bears date July 27, 1872, and it provides: "That the Carondelet Iron Works have this day sold to the said George S. Moore & Co., the entire product, more or less, in pig iron, of their furnace, from the 1st day of August, A. D. 1872, to the 31st day of December, A. D. 1872, inclusive, at ($50) fifty dollars, No. 1 foundry, ($48) forty-eight dollars No. 2 foundry, ($45) forty-five dollars for mill, and ($43) forty-three dollars for white and mottled iron, the proportion of white

and mottled iron not to exceed ten per cent. of the quantity of gray mill iron; and in case of such excess of white and mottled iron, said George S. Moore & Co. have the option to reject such excess over ten per cent.; the said iron to be weighed at the furnace, and delivered at the furnace landing, on boats or cars, free of charge; payments to be made on the first day of each month, in cash, for all the iron made during the month last preceding, whether taken away or not."

On the 12th day of February, 1873, the defendant rendered a statement to Moore & Co., as follows:

ST. LOUIS, Feb. 12, 1873.

Messrs. GEORGE S. MOORE & Co.

Bought of CARONDELET IRON WORKS:

138 tons No. 1 iron, 50	$ 6,900
400 tons No. 2 iron 48	19,200
610 tons mill iron 45	27,450
	$53,550

Certificate sent and iron piled in our yards.

C. I. W. per McN———."

The controversy in this case grows out of the 610 tons of iron embraced in the statement, for which Moore & Co. paid $27,450 upon the rendition of the account.

It is not claimed that the contract of date July 27, 1872, was ever in any manner changed or modified by the parties, but it is conceded to be in full force and effect.

To determine, then, the rights and obligations of the parties, resort must be had to the contract under which the iron was manufactured and furnished.

Under the contract and by its express terms, Moore & Co. purchased the entire product, more or less, in pig iron, of the furnace of the defendant, from the 1st day of August, 1872 to the 31st of December, 1872.

The Carondelet Iron Works did not contract to furnish any definite amount of any particular grade of iron, nor was it concluded by the contract as to the quantity of the entire product, or as to the amount of each grade, or as to the quality of the iron to be manufactured.

The Iron Works was absolutely bound to deliver to the plaintiffs the entire product of its furnace which should be

manufactured between the specified dates named in the contract.

On the other hand, Moore & Co. were bound by the contract to accept and pay for the entire product of the furnace, except an option was reserved on their part; in case the white and mottled iron manufactured exceeded ten per cent. of the quantity of gray mill iron, then they had the option to reject such excess over ten per cent.

It is clear, by the terms of the contract, the entire product of the furnace was purchased by the plaintiffs, unless they, when the quantity of mill and of white and mottled irons was ascertained, should elect to reject a given quantity of the latter, as provided by the contract, and within a reasonable time exercise that option.

It is not averred in the declaration, nor shown by the proof, the amount of mill or white and mottled irons manufactured at the furnace from the 1st day of August, 1872, to the 31st day of December. Under such circumstances, we are at a loss to conjecture upon what principle or by what authority Moore & Co. would have the right to reject any portion of the white and mottled iron, as the contract only gave them the option to reject the excess of white and mottled iron over ten per cent. of gray mill.

It is true, Moore testified that the defendant delivered his firm from 1,800 to 2,000 tons of iron under their contract and that this embraced No. 1 and No. 2 foundry, and gray mill iron, as defendant billed it to them, and upon his re-examination, he says he told Cashmon, in December, 1873, that he refused to take any of the iron except the ten per cent. and it amounted to two tons and a fraction on the twenty-one tons which had been shipped, etc.

But this can not be regarded as sufficient to establish a foundation for an option under the contract.

The plaintiffs were bound to take the white and mottled iron manufactured, unless it exceeded ten per cent. of the gray mill, and unless, also, they, within a reasonable time, elected to reject such excess over ten per cent., and give the defendant notice of that fact.

In order to show, therefore, that they were not required to take white and mottled iron, it devolved on them to show

the amount of gray mill produced by the furnace, and the amount of white and mottled iron, and that the latter exceeded ten per cent. of the former, and that they elected not to take such excess, and duly notified defendant of such fact. The evidence introduced was entirely insufficient to establish the fact of an election on the part of plaintiffs, and notice to the defendant.

But, even if the proof had established the fact that there was an excess of white and mottled iron over ten per cent. of gray mill, under the evidence, the verdict could not be sustained.

On the 31st of December, 1872, the defendant had finished the manufacture of the iron. In the early part of January following, Moore, one of the plaintiffs, and James P. Card, an authorized agent of the plaintiffs, who also was interested with them in the purchase, went to the iron works, saw the iron, and had full and ample opportunity to make as thorough an examination of it as they desired. After they had looked the iron over, they requested the superintendent to have it weighed, with a view to a settlement.

On the 8th day of February, the defendant had the iron stacked in convenient piles for shipment and weighed. On the 12th of the same month an account of the iron was rendered and it was paid for.

In the spring of 1873, plaintiffs' agent again visited the yard, and had an opportunity to examine the iron. In the mouth of March, twenty tons were sold to a party in Indianapolis. In October, warehouse receipts were taken for 467 tons of the iron, and upon them money was borrowed. After thus accepting the iron and assuming the exclusive control over it, and on the 31st of December, 1873, the plaintiffs discovered, as they claim, the iron was not of that quality called for by the contract. A notice in writing was served upon the defendant, in which it was notified that they declined and refused to accept 607 of the 610 tons. This, together with the warehouse receipts, were formally tendered back and the money which had been paid for the iron was demanded.

We understand the rule to be, that where an option is given, unless the time is determined by the contract, it must be exercised within a reasonable time or the right will be lost.

In this case the plaintiffs saw this iron in the yard after it was manufactured, and had full opportunity to make as thorough an examination as they desired. It was weighed, they paid for it, and assumed the control of the property. Almost an entire year expires before any complaint is made in regard to the quality of the iron. In the meantime iron has declined in the market almost one half. Under such circumstances, to hold that the option given by the contract was exercised within a reasonable time, would be unjust and contrary to the well-settled rules of law which must govern a question of this character.

It is, however, claimed by the plaintiffs that the defendant knowingly and falsely pretended and warranted to the plaintiffs that the 610 tons manufactured was mill iron, and that relying upon such representations and warranty, the iron was paid for; but the record contains no evidence of fraud, false representations or warranty.

It is not pretended that the defendant, or its agents, made any statement or representations in regard to the quality of the iron, except the statement or bill rendered of the iron, dated February 12, 1873, in which the 610 tons is denominated mill iron.

The question, then, is, can this bill be regarded as a representation or warranty of the quality of the iron?

The superintendent, McNair, testified that he made out the bill from the information, as to quantity and quality, derived from the weigher's certificate, as is usually done in making bills for iron. The 610 tons were weighed at Card's request. After plaintiff Moore and Card, in the early part of January, visited the yard and looked over the iron, and requested it should be weighed, Farnsley, who was the city weigher, did the weighing and made out a certificate, and this bill, which is relied upon as a warranty, is a mere transcript from the weigher's certificate, with contract prices added.

While no particular form of words is required to make a warranty, nor is it necessary that the word warrant should be used to form such a contract, still it is necessary that such expressions should be used as show the intention of the party to bind himself to make good the quality of the arti-

cles as described or represented, and not a mere statement or expression of opinion as to the quality or character of the articles sold: *Adams* v. *Johnson*, 15 Ill. 346.

In *Towell et al.* v. *Gatewood*, 2 Scam. 22, where the vendor of a quantity of tobacco delivered the vendee a bill of the goods sold, signed by him, in which the tobacco was described as good, first and second rate, it was held the language used as to the quality of tobacco was a mere matter of judgment, and did not constitute a warranty.

We do not think the language used in the bill of iron rendered, shows that it was the intention of the defendant to bind itself to make good the quality or grade of iron as described, but the designation, mill iron, was a mere statement or expression of opinion as to quality, and can not be regarded as a warranty.

As to the statement or representations being fraudulent, as averred in the declaration, that position is utterly untenable. The plaintiffs had as much knowledge in regard to the quality of the iron as the superintendent of defendant, who made out the bill. Before the bill was rendered, the plaintiffs saw and inspected the iron in the yard where it was manufactured, where they were at liberty to break it and make as minute an examination as they pleased. No concealment was used or representations made to induce the plaintiffs to believe the iron was of any particular grade, or to prevent an examination into its quality. Everything connected with the transaction seems to have been open and fair. We are, therefore, of opinion that no right of action existed in favor of plaintiffs on the ground of warranty or fraudulent representations.

The 610 tons of iron, however, was paid for at $45 per ton. For whatever portion of it was white and mottled iron, under the contract, plaintiffs were only required to pay $43 per ton. The $2 per ton, therefore, overpaid, they will be entitled to recover back.

The instructions given in this case are voluminous, various objections have been urged to them, but we have not the time to consider them in detail. So far as they are in conflict with the views here expressed, they are erroneous.

The judgment will be reversed and the cause remanded for another trial consistent with this opinion.

Judgment reversed.

GERRENS ET AL. v. THE HUHN AND HUNT SILVER MINING COMPANY.

(10 Nevada, 137. Supreme Court, 1875.)

Measurement, "more or less." A contract to run a drift 180 feet, "more or less," is completed when 180 feet have been run.

Material excess. On such a contract plaintiff sued for 334½ feet, but did not aver that the additional feet were run at the instance of defendant, nor that the defendant had promised to pay for the same. *Held*, that the complaint did not state a cause of action.

Appeal from the District Court of Lincoln County, Seventh Judicial District.

The plaintiff Gerrens had judgment in the court below from which the defendant appealed.

ELLIS & KING, for appellant.

J. C. FOSTER, for respondents.

By the Court, EARLL, J.

In this appeal, it is only necessary to consider the question raised by the first specification in the demurrer to the complaint, to wit, does the complaint state facts sufficient to constitute a cause of action? The plaintiffs allege: "That heretofore, to wit, on the first day of December, A. D. 1873, the said plaintiffs, as the parties of one part, and the said defendant, as the party of the other part, at, etc., made and entered into a mutual written agreement, by the terms of which the said plaintiffs agreed to run a certain drift in and upon the mining ground of said defendant, situate, etc., for the distance of one hundred and eighty feet in length, more or less, for and in consideration of the promise and agreement in said written agreement expressed, of said defendant to pay said plaintiffs

the sum of ten dollars in gold coin per foot therefor, in length; that said plaintiffs, in pursuance of said agreement, did run said drift the distance in length of three hundred and eighty-four and one half feet; that the defendant has paid to said plaintiffs the sum of three thousand three hundred and eighty-five dollars gold coin, in pursuance of said agreement, for work so done and performed by them; but fails and refuses to pay the balance of four hundred and sixty dollars gold coin, now due and payable from said defendant to said plaintiffs, in accordance with the terms of said agreement."

It is admitted by the counsel for both parties, that the contract was completed on the part of the respondents when they had constructed the drift one hundred and eighty feet; and it is also admitted by the complaint that the defendant had paid them, in pursuance of said agreement, three thousand three hundred and eighty-five dollars, gold coin, thus showing, not only that there is nothing due from defendant to respondents upon the contract, but that they have been overpaid thereon the sum of one thousand five hundred and eighty-five dollars. It is true, respondents allege, that "in pursuance of said agreement they did run said drift three hundred and eighty-four and one half feet," but the contract required respondents to run the drift one hundred and eighty feet only, and the complaint contains no averment showing that the extension thereof was at the instance of defendant, or that defendant ever promised to pay respondents ten dollars or any other sum per foot therefor. Indeed, the complaint contains no averment connecting, in any manner, the extension of the drift beyond one hundred and eighty feet, with the contract declared upon, or any other contract; and, for aught that appears, it was voluntary on the part of respondents. It is quite probable, however, that the extension of the drift beyond the one hundred and eighty feet specified in the contract, was done pursuant to some agreement between the parties, either connected with the original contract, or by an agreement independent thereof. If it was provided for by an alteration of the original contract, the facts constituting the change and connecting it therewith should have been stated in the complaint. But if it was done pursuant to an independent agreement, then the action should have been brought thereon, or upon a *quantum meruit*. We

are of opinion that the complaint does not state facts sufficient to constitute a cause of action against the defendant.

The judgment is therefore reversed, and the cause remanded for further proceedings, with leave to the plaintiffs to amend their complaint.

THE CHICAGO & ALTON RAILROAD CO. v. THE CHICAGO, VERMILION & WILMINGTON COAL CO.

(79 Illinois, 121. Supreme Court, 1875.)

[1] **Coal freight—Subsequent purchaser estopped.** Certain persons at the expense of the V. Coal Company constructed a railroad from the center of a coal region to W., a station on the I. C. R. R., and on April 30, 1869, sold their road to the St. L. J. & C. R. R., and took from it an agreement, which among other things, provided that the purchaser would transport all coal from the V. Coal Company mines to W., at the rate of $3 per car, provided the coal company furnished the necessary cars and would enter into a contract to deliver all their coal destined for W., to the purchasers for transportation. On the day of the purchase the St. L. J. & C. R. R. sold and conveyed to the C. & A. R. R. the railroad just purchased; the last named company transported the coal at the price named in the original contract of sale for the period of three years, but afterward required $9 per car. Upon suit brought to recover the excess, to wit, $6 per car paid by the V. Coal Company over the original price agreed upon with the St. L. J. & C. R. R. it was *held*, that the C. & A. R. R., by carrying the coal at $3 per car, for more than three years, had given strong proof that they had adopted the contract of the St. L. J. & C. R. R., had thus put a construction upon their own obligations and were estopped by their own act and conduct.

Freight regulation act construed. On the day that the C. & A. R. R. increased the charge to $9 per car an act of the General Assembly went into effect, to prevent extortion and unjust discrimination by railroad companies. *Held*, that the act was not designed to reach the case of a contract to carry on certain terms, which existed prior to the passage of the act.

Condition precedent—Waiver. The execution of the contract by the V. Coal Company to deliver all their coal for transportation was not a condition precedent, and by executing the terms of the original contract both parties waived the necessity of a more formal contract.

Moral duress—Voluntary payment. The payment of $9 per car by the V. Coal Company, when they had no other means of conveying their coal to market, was not a voluntary payment, but a kind of moral duress.

[1] *Leavers* v. *Cleary*, Ante, 618.

Appeal from the Superior Court of Cook County.

GEORGE W. SMITH, for the appellant.

WALKER, DEXTER & SMITH, for the appellee.

By the Court, BREESE, J.

This was assumpsit, in the Superior Court of Cook County in which a recovery was sought on the following facts:

Prior to April 30, 1869, certain individuals had, through and by one Oliver Young, contractor, constructed a railroad extending from Streator, the center of a coal region, on the Vermilion river, in LaSalle county, to Wenona, in Marshall county, situate on the Illinois Central Railroad. On April 30th, these parties sold this road to the St. Louis, Jacksonville and Chicago Railroad Company, for a valuable consideration agreed upon and paid. An instrument in writing, called a memorandum of this contract of sale, was executed by these parties, on the fourth clause of which this controversy arises. That clause is as follows:

"It is hereby mutually agreed between the parties, that all coal, at any and all times hereafter carried from the mines of the Vermilion Coal Company, at Streator, to the town of Wenona, for the use of that town and its vicinity, or for delivery to the Illinois Central Railroad Company for the use of that company, or for further transportation on its line of railroad, shall be carried over the railroad herein provided, to be conveyed, at the price of three dollars for every car load of ten tons capacity, so carried: *Provided, however*, that this article shall not be in force unless the Vermilion Coal Company shall, at their own proper cost and expense, furnish and provide all the coal cars necessary and proper for their use, charging no mileage for the use of the same, and that said Vermilion Coal Company shall enter into a contract with said first party, binding itself to give to said first party, at all times hereafter, the transportation of all coal from their mines at Streator, destined to the town of Wenona, and to the Illinois Central Railroad Company, as aforesaid."

The persons who built this road from Streator to Wenona, represented the Vermilion Coal Company, which association

furnished the money to build it, and to whom was paid the consideration received from the St. Louis, Jacksonville and Chicago Railroad Company, on the sale thereof to them, and their officers executed this agreement. Up to March 16, 1870, the coal company operated this road, when, on that day, it was turned over to the railroad company above named, which company, on the same day, turned it over to the Chicago & Alton Railroad Company, appellants, since which time it has been operated by that company.

It is admitted that appellees are the same as the Vermilion Coal Company.

From this date, March 16, 1870, the Chicago & Alton Railroad Company, appellants herein, up to and until June 30, 1873, carried, from Streator to Wenona, the coal delivered to it by appellees, at the rate of three dollars per car, and there were more than 300 cars so carried, appellees furnishing their own cars, the service of appellants consisting in hauling the cars over this road.

In the following months of July, August, September and October, 1873, appellees shipped by this road of appellants 279 cars of coal, to be carried from Streator to Wenona, appellees paying therefor to appellants, for such transportation nine dollars per car, they being appellees' own cars, which amounted to the sum of $2,511, the excess over three dollars per car amounting to $1,674.

It is for this excess over three dollars per car, this action is brought, declaring upon the agreement, with the common counts, and the only question is, are appellees entitled to recover this amount, under this state of facts?

The issue was tried by the court without a jury, and there was a finding and judgment for the plaintiffs for this excess.

The defendants appeal, and insist the evidence does not establish a contract between these parties. They insist there was no contract in writing between them—that none can be implied from the acts of the parties.

It is not contended by appellees that any contract in writing was, at any time, actually executed between them and appellants in their own corporate names. The true question is, are these parties in such relation to the parties who actually made the contract, as to entitle appellees to an action upon it?

In other words, can appellees claim to be such beneficiaries, under this contract, as to entitle them to an action for its breach?

The parties who made the agreement of April 30, 1869, were the individuals who composed the Vermilion Coal Company. By it, a sale of a railroad which they had constructed, twelve miles in length, for the purpose of conveying coal from Streator to Wenona, was agreed upon with a railroad corporation known as the St. Louis, Jacksonville & Chicago Railroad Company. The contract of sale was not fully completed until March 16, 1870, when the road was duly transferred to this railroad company, who on the same day, turned it over to the appellant company.

It is admitted appellees are the same as the Vermilion Coal Company, and that the contract was made for the benefit of the latter company, seems evident, from the fact that, in the agreement for the sale, the side tracks of the road sold were to remain the property of the Vermilion Coal Company. This company adopted and ratified the act of the parties making the sale, received the consideration paid therefor, and in all respects assumed to be parties to the contract.

The facts are sufficient to show that the individuals who made this contract with the Jacksonville railroad company were acting for the benefit of the Vermilion Coal Company whether with authority or not is immaterial, as the coal company adopted their act and performed the stipulations of the contract so made. To this effect is the case of *The Ohio & Mississippi Railroad Co.* v. *Middleton*, 20 Ill. 629; Story on Agency, §§ 255, 259.

It is very clear, a contract in writing was made which was adopted by appellees, by which the Jacksonville road was bound to carry the coal of appellees according to its terms.

But appellants claim, if this be so, no contract exists between appellees and appellants of like import, either by implication or otherwise.

It appears, on the day (March 16, 1870,) the road was turned over to the Jacksonville company, it was, on the same day, turned over to the appellant company. There is not, in the deed of transfer, any covenant that appellants shall perform all the obligations assumed by the Jacksonville company to the coal company, but, from the day of the transfer to July

1, 1873, more than three years, appellants did carry appellees' coal from Streator to Wenona, over this road, at three dollars per car, the coal company furnishing the cars. Up to this time it was not questioned appellants were bound to carry for three dollars a car, although their superintendent complained the contract was too low, yet that he felt bound to carry it out. Appellants placed their own construction upon this contract, and of their obligations under it, by carrying coal for three years. By doing this, they expressly assumed the contract of the Jacksonville company. If the price for transportation was low, that fact may have been one of the chief inducements of the coal company to sell to the Jacksonville company, but in fact to appellants, as the former company transported no coal. The transaction would seem to have been for the use and benefit of appellants.

It seems to us, appellants, when they came into possession of this road, and commenced to carry appellees' coal for three dollars per car, demanding no more, when the regular price was nine dollars per car, and so continued more than three years, put a construction upon their obligation, which they can not now avoid; they must be held estopped by their own act and conduct. These facts go strongly to show they adopted the contract of the Jacksonville company, and came under all its obligations.

Although appellees are not named in the contract, they can become beneficiaries under it, and have an action for its breach: *Eddy* v. *Roberts*, 17 Ill. 505; *Brown* v. *Strait*, 19 Ib. 89; *Bristow et al.* v. *Lane et al.*, 21 Ib. 194, where numerous cases are cited on the point.

As we have said, and the case shows, appellants carried the coal of appellees at three dollars per car, up to the first day of July, 1873, from and after which time they demanded and received of appellees nine dollars per car, appellees furnishing the cars. On that day, an act of the General Assembly, to prevent extortion and unjust discrimination by railroad companies, went into effect.

This act, it was supposed by the appellants, and probably by appellees also, might interfere with the further performance of this contract, as a discrimination is made in favor of appellees, the regular rate for a car load of coal being nine

dollars per car. But the president of the appellants' company objected, on the ground of there being no obligation upon his company to transport appellees' coal for three dollars per car.

This act of the General Assembly was not designed to reach such a case as this, where a contract existed prior to the passage of the act, to carry on certain terms. We do not think the law was intended to interfere with contracts, or to abrogate them. It was not intended by the General Assembly, by this law, to visit a railroad company with heavy penalties, which had, prior to the enactment, entered into a valid contract with parties for transportation of freight at a less rate than the general public was required to pay.

On this point we are referred by appellees to § 27 of Chap. 114, title, "Railroads and Warehouses," page 805, R. S. of 1874, as applicable. We are not inclined to hold that section has any application to this case. It contemplates contracts of a different nature, and affects those corporations only which have adopted the act in question, which it is not shown appellants have done. The true ground on which to place the case is, that the act against discriminations was not intended to annul contracts fairly made prior to its passage.

Appellants insist that the mere fact appellants carried for three dollars per car for three years and more furnishes no evidence they were obliged to carry at that rate for all time, and asks, does a merchant who sells to a customer, during a term of years, an article at a certain price, intend to become bound to continue to sell at the same price during the pleasure of the customer? And does a manufacturer, who pays workmen a certain standard of wages for a long period of time, thereby exhibit a purpose to preclude himself from making a reduction in such wages?

The instances put are hardly apposite; but if a manufacturer takes into his service a laborer at certain stipulated compensation per month, he would be obliged to pay that compensation until another contract was made. So with the merchant; if he sells certain goods to a customer at a certain price, he would be bound by the agreement so long as the customer traded with him, unless the customer be specially notified he can no longer have the goods at the agreed price. But this case is different in principle. Here, the road was

constructed by the coal company for the purpose of carrying their coal to market. It was the only means the company had by which to reach the markets on the Illinois Central railroad. In their hands, it was a certain outlet, and a cheap one. Their object in transferring it to another railroad company having important connections, was the same, furnishing facilities for marketing their coal, and it was but reasonable there should be a stipulation in the contract of sale that they should be liberal. This, it may well be supposed, was the governing motive in the sale, or at least one of the principal objects. In the contract with the Jacksonville company by name, but really with appellants, no time is limited for the duration of this contract, and it must continue, if its stipulations are performed by appellees.

But appellants contend that, if the agreement of 1869, the deed and the act of carrying for three years, raise the implication of a contract between these parties, then such implied contract must be of the nature and scope of the agreement of 1869, for the reason that such agreement is the basis of the implication.

If there be a contract, it is conceded it must spring from the agreement of 1869, and because that contains this provision, "that this article shall not be in force unless the Vermilion Coal Company shall * * enter into a contract with said party, binding itself to give to said first party at all times hereafter, the transportation of all coal from their mines at Streator, destined to the town of Wenona, and to the Illinois Central Railroad Company, as aforesaid."

Appellants insist that this stipulation shows the covenant to carry was conditional, and never became operative, as no contract of the nature above specified was ever executed, binding the coal company, and there was no mutuality. They insist this was a condition precedent, to be performed by the coal company, and they must show it has been performed.

The answer to this is, and we think a sufficient one, that the proofs show no complaint of the non-execution of such a contract was made at any time by appellants, or any request by them that it should be made and formally executed and delivered, or any meeting of the officers of the respective companies called for such purpose, or any talk about it at any time. Ap-

pellants entered upon the performance of the contract, as expressed in the agreement, without objection, and so continued for more than three years, at no time demanding a formal contract. The only condition precedent to be performed by appellees was, furnishing the cars in which to place their coals. Should they fail in this, it is clear appellants would not be bound to carry at the stipulated price.

Had appellants deemed it necessary and proper, in view of their own interests, to require the execution of such a contract, it was in their power so to do, and it is so provided in the seventh clause of the agreement. That clause is as follows:

"It is further hereby mutually agreed and understood, that, if it shall be deemed necessary and proper so to do, a formal contract, embodying all the covenants and agreements herein contained, may be executed between the parties," etc.

It seems clear, from this, that a request by one party or the other should be made for a more formal contract, which not being made, the inference is irresistible both parties were content to rely upon the agreement and its terms as made.

But it may be insisted, as it is, by appellees, if this formal contract was a condition precedent, it could be waived, and was waived, by appellants, they continuing to carry, under the agreement, for three years and more, without question of their liability so to do.

We do not perceive, from the condition of these parties, any necessity for any more formal contract than the agreement itself shows. There was no rival road in the direction of the Illinois Central railroad from Streator, and no possibility of shipping coals in that direction without the aid of this road, and the case shows that appellees have shipped no coals in the direction of the Illinois Central by any other route. Should the time come when appellees might avail of another route to the Illinois Central, and should avail of it, appellants would have just ground of complaint, and, doubtless, an action for damages on the agreement.

We fail to perceive any necessity for a more formal contract, and we are satisfied appellants did not deem a more formal one necessary or proper, or they would have demanded such an one, preliminary to carrying. We think appellants should be held to their own interpretation of the agreement,

and that they should be considered as having waived a more formal contract.

The further point made by appellants is, there being no contract, the suit can not be maintained, or in other words, the count for money had and received can not be maintained.

It is claimed appellees paid the additional charge of six dollars per car voluntarily, and can not recover it back under this count.

The action is brought on the agreement of April, 1869, on the theory that thereby a contract exists between these parties as successors of the original contracting parties, and we recognize this theory as correct. It can hardly be said these enhanced charges were voluntarily paid by appellees. It was a case of "life or death" with them, as they had no other means of conveying their coals to the markets offered by the Illinois Central, and were bound to accede to any terms appellants might impose. They were under a sort of moral duress, by submitting to which appellants have received money from them which, in equity and good conscience, they ought not to retain: *Ripley* v. *Gelston*, 9 Johns. 201; *Taylor* v. *Taylor*, 20 Ill. 650; *Watson* v. *Wolverton*, 41 Ib. 241.

Upon the point made by appellants, that this court will not presume a contract which is opposed to the spirit of the act in force July 1, 1873, concerning railroads, we have said we are not of opinion that act was designed to annul contracts fairly made prior to its enactment.

On the whole case, we are of opinion appellees have maintained their right to recover back the excess paid for carrying their coals, and affirm the judgment of the superior court.

Judgment affirmed.

WHEELER v. JOHNSON.

(21 Minnesota, 507. Supreme Court, 1875.)

Contract of exchange between quarries—Want of privity between the intermediate carrier and the quarrymen. Plaintiff was engaged in transporting stone, and for his own convenience procured the owners of two separate quarries of stone of the *same quality*, to allow orders on quarry A to be filled from quarry B, and *vice versa*, in about equal

quantities. The owner of quarry A demanded payment for the stone so delivered from his quarry, and the carrier advanced it, whereupon the debt was assigned to him. *Held*, in suit by the carrier against the owner of quarry B, that the contract was one of *exchange* between the quarrymen, and that no cause of action existed against the defendant.

Appeal by defendant from a judgment of the District Court for St. Louis County, MCKELVEY, J., presiding and from an order refusing a new trial.

SETZER & EGAN, for appellant.

J. D. ENSIGN, for respondent.

BERRY, J.

Plaintiff was engaged in transporting certain stone belonging to the defendant, from defendant's quarry to the mouth of the St. Louis river, and also at the time engaged in transporting stone of the same quality, belonging to one Davidson, from Davidson's quarry to the Duluth canal. At plaintiff's request, and for his convenience, Davidson, for himself on the one hand, allowed plaintiff to deliver a quantity of stone belonging to defendant at Duluth canal, as and in the place of stone belonging to said Davidson and for his (Davidson's) use and benefit; and defendant, for himself, on the other hand, allowed plaintiff to deliver an equal quantity of stone, belonging to Davidson, at the mouth of the St. Louis river, as and in the place of stone belonging to defendant, and for defendant's use and benefit. Under this arrangement, plaintiff delivered, at Duluth canal, fifty-one cords of defendant's stone, and at the mouth of the St. Louis river, fifty-three cords of Davidson's stone.

The plaintiff brings this action to recover of defendant the sum of $212, alleging that, upon Davidson's demand therefor, he paid him that sum for the fifty-three cords of stone aforesaid, and that thereupon Davidson sold and assigned to him his (Davidson's) claim against defendant on account of said stone.

It is evident that this action can be maintained only upon the theory that defendant was in some way liable to Davidson for the price of the stone. But the facts in the case negative this theory, because they show that the fifty-three cords of

stone were delivered under an arrangement for an *exchange* of defendant's stone for the same, an arrangement assented to by Davidson, and which was to be carried out by plaintiff, and for carrying out of which defendant is in no way shown to have been responsible.

Judgment reversed.

GRAVER v. SCOTT.

(80 Pa. St. 88. Supreme Court, 1875.)

Divisible contract—Coal. A contract for the sale of a piece of land, for a sum certain, and of coal under other lands payable by an annual royalty. *Held*, on its face to be a divisible contract, but that parol evidence was admissible, that the land was necessary for vendee's enjoyment of the coal, and that it was the understanding at its execution, that the contract was entire.

The fact that a sale is of several parcels of land, with a particular price apportioned to each, does not make the contract necessarily severable; exceptional conditions may exist which necessitate its being treated as an entirety in equity.

Error to the Court of Common Pleas, No. 2, of Allegheny County.

Action by Scott against Graver for coal which defendant was to mine from plaintiff's property and pay for, under the following agreement between them:

"Agreement made this 13th day of September, 1873, at Pittsburg. This agreement witnesseth, that Alexander Scott, of Allegheny county, of the first part, agrees to sell to M. Graver, of Allegheny city, of second part, the following described property for the amount and on the terms hereinafter mentioned:

"A piece or parcel of ground, known as the ice pond, situated in Allegheny, Butler and Armstrong counties, at the junction of Buffalo creek and Allegheny river, bounded by Buffalo creek, Allegheny river and West Penn Railroad, containing five and a quarter acres, more or less; also a tract of coal property, known as the Miller's heirs property, said to

contain about three acres surface and about seventeen acres of coal.

"The terms of purchase are these: For the ground known as the pond property, party of the second part agrees to pay twenty-five hundred dollars; two thousand dollars to be paid on delivery of the deeds and possession of the property; the other five hundred to be paid at the end of three years.

"The coal is to be paid for at the rate of a half a cent per bushel, according to actual measurement, as dug and delivered; payment for the coal to be made at the end of each year. Party of second part agrees to use at least $1,000 worth of coal at half cent per bushel each year."

The affidavit of defense was:

"This affiant saith, that it is true that the piece or parcel of ground known as the ice pond property, and the tract of coal mentioned in said agreement, are not contiguous, but in fact they bear such relation to each other that this affiant would not have bought the coal property, under any circumstances without the said pond property; and affiant saith that the plaintiff insisted that this affiant purchase the said coal property in connection with the said ice pond property, and the parties dealt in respect to said properties as a unit; that the said coal property would be worthless to the defendant without the ice pond property. Affiant further saith that the plaintiff hath never been able, and is not now able, to make title to affiant for the ice pond property, nor has he ever been able, nor is he now able to give this affiant possession thereof. That on the 21st of August, 1874, this affiant caused to be tendered to the plaintiff the $2,000 purchase money mentioned in said agreement, and demanded that the plaintiff execute to the affiant proper deeds, and give him possession of said property. But the plaintiff neglected and refused to comply with said demand, and still neglects and refuses. That this affiant was never in possession of either of said properties, nor did he ever mine any coal from the said coal property. Affiant saith that the plaintiff hath violated his contract in every respect, and that he has never even tendered affiant a deed for the coal."

On the trial the plaintiff testified that defendant did not take out any coal from September 13, 1873, until September

18, 1874; he made a demand on September 24, 1874, of defendant, for payment of the $1,000 due under the contract; but defendant did not pay.

The defendant, notwithstanding plaintiff's objection, was allowed to testify that he purchased the ice pond for the purpose of erecting an oil refinery on it; he would not have purchased the coal property without the pond property, but they were only 400 or 500 yards apart, and plaintiff wanted the pond property to sell the coal property. Witness did not want the coal property; it was not essential for the purpose for which he made the purchase. Plaintiff never gave him possession of the property nor a deed therefor, although witness tendered the $2,000. One Tarr was in possession of the pond property and claiming title thereto until after suit brought.

The court charged:

* * * "In the trial of this cause I received with some doubt testimony as to what transpired at the time that this compact was being entered into. I did it for the purpose of enabling the jury to determine whether this contract was an entire contract or was a separable contract. Had I been determining the contract upon the paper alone, I might have said, as it was my duty to construe the contract, that it was a separable and divisible contract. I say now to you upon reflection that I think that testimony was improperly received. I think that this contract is a separable and divisible contract; that the right to recover has no reference nor allusion to the ice pond property whatever; that the fact that Tarr was in possession, and that Mr. Scott could not make a deed for this property, is no defense to the right to recover for the coal property for the $1,000; and I so instruct you, and that under all the evidence in this case your verdict must be for the plaintiff, debt, interest, and costs. * * * We say, as a matter of law, that there is no defense."

The verdict was for the plaintiff for $1,080.

The defendant took a writ of error and assigned for error:

1–3. The charge of the court.

4. In not charging that the plaintiff could not maintain the action without a previous tender of a deed for the coal property.

M. W. ACHESON, for plaintiff in error.

W. S. PURVIANCE & S. A. PURVIANCE, for defendant in error.

By the Court, WOODWARD, J.

Upon its face, the instrument executed by these parties on the 13th of September, 1843, created two separate and independent contracts. The ice pond lot was sold for $2,500, in two stipulated payments. The consideration for the coal property was to be the payment at the end of each year of half a cent per bushel for all the coal dug and delivered, the purchaser, the defendant below, agreeing to use $1,000 worth of coal each year at the specified price. On the trial the ground was taken on the part of the defense, that while the agreement was separable and divisible in its provisions, yet in fact, in view of the understanding of the parties, it was an entire contract, and was induced by a single substantial consideration. Evidence was given to prove that the motive of the defendant was to obtain the title to the ice pond lot for the erection of an oil refinery; that he did not want the coal lot, and under no circumstances would have purchased it by himself, but was compelled to take it, as the plaintiff insisted on selling both properties together; and that the subjects-matter of the agreement were treated as an entirety throughout the negotiations. It was shown, also, that one Tarr was in possession of the ice pond property, when the contracts were made, and was not dispossessed until December, 1874, two months after this suit was brought. In the charge of the court, the jury were instructed that the evidence had been improperly received and should be disregarded; that the rights of the parties were governed by the agreement; and that as a matter of law no defense had been shown to plaintiff's claim.

In the absence of any proof of explanatory facts, when property is sold by a single contract in separate lots, and a title to a portion of them fails, equity will compel the purchasers to take the lots to which title can be made: 1 Sugden on Vendors, 291. Thus, in *Poole* v. *Shergold*, 1 Cox, 273, a man became the purchaser of several lots of an estate, the title to two of which failed. Upon the master's report, Lord Kenyon said he must take it for granted that these two lots were

not complicated with the others, so as to entitle the purchaser to resist the whole, and therefore decreed specific performance *pro tanto*. But it was said in the same case, that if a title can not be made to a lot which is complicated with the rest, the purchaser will not be compelled to accept the rest. And Lord Kenyon said that if a purchase was made of a mansion house in one lot, and of farms, etc., in others, and no title could be made to the mansion house, it would be a ground to rescind the whole contract. In a previous case, before Sir Thomas Sewell, Master of the Rolls, a man who had contracted for the purchase of a house and wharf, was compelled to take the house, although he could not get the wharf, and although it appeared that his object was to carry on his business at the wharf. This was declared by Lord Kenyon to be a determination contrary to all justice and reason; and in a note to 1 Sugden on Vendors, 294, it is stated that "this case has been frequently disapproved, and would not have been so decided at this day." In *Stoddart* v. *Smith*, 5 Binney, 355, it was said by TILGHMAN, C. J., that "there are cases where failure to part ought to dissolve the whole contract. * * * The principle is this; that where the part lost appears to be so essential to the residue that it can not be reasonably supposed the purchase would have been made without it, the contract is dissolved in toto." In that case the contract was enforced as to the residue for which title could be made, but the reasons given were, that the five lots lost were not adjoining or particularly connected with the others; and that "there was no evidence of their being in any way essential to the use or full enjoyment of the residue." In *Freetly* v. *Barnhart*, 1 P. F. Smith, 279, which was a bill in equity to enforce the specific execution of a contract, the plaintiff had agreed to sell to the defendant three leases of land in West Virginia, in consideration for which the defendant was to convey to the plaintiff eight acres of land in Venango county, Pennsylvania, and become a member of the Cunningham Oil Company. On the hearing there was evidence of the invalidity of at least one of the leases. It was held that "the lease of the Duland tract was clearly defective to the extent of one third, the party entitled to that being *non compos mentis* when it was made. This, of itself, would justify a refusal to decree in such a case

as this." The action here is in affirmance of the contract, and *Nicol* v. *Carr*, 11 Casey, 381, shows it to be subject to the rule that would apply to a bill for specific performance. So far as the evidence indicates the use to which the coal property was to be devoted, it would appear that fuel was to be obtained from it for the purposes of the oil refinery on the ice pond lot, which it was the design of the defendant to erect. How the properties were to be connected, and how and to what extent the enjoyment of the one was dependent on the possession of the other, the jury alone could have determined.

In support of the ruling of the court below, the counsel for the plaintiff have relied in their argument on the doctrine asserted in 2 Parsons on Contracts, 29-31, that "if the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. * * * But if the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." The doctrine is stated with sufficient accuracy to meet a case whose particular circumstances warrant its adoption, but the defect of the statement, as quoted by counsel, consists in its universality. While the reduction to the limits of a maxim of the great body of principles that make up an entire branch of our legal system, might be convenient, it would be exceedingly unsafe. *McClurg* v. *Price*, 9 P. F. Smith, 420, was cited as an instance where this rule was adopted without qualification. All that was done there was to settle the law that bore on the facts which the case presented. It was not designed to unsettle or disturb the authority of *Obermyer* v. *Nicols*, 6 Binney, 159, and of other well considered precedents, containing such elements as—proof of substantial but defective performance, proof of a failure to perform capable of compensation in damages, or proof of other peculiar facts requiring the application of peculiar principles. *The Lucesco Oil Company* v. *Brewer*, 16 P. F. Smith, 351, was also cited. The contract there was manifestly severable, and was within the

general doctrine of Parsons on Contracts. In neither *McClurg* v. *Price*, nor the *Oil Co.* v. *Brewer*, were there any circumstances proved to show such relations of parties, such situation of property, or the existence of such exceptional conditions as to require the intervention of a jury to promote an equity, or avert an injustice, or prevent a fraud.

The parol evidence was competent, and was properly received by the court. It was said in *Barnhart* v. *Riddle*, 5 Casey, 92, "that many cases might be cited from the books to mark the distinction, too often lost sight of by counsel, in the zeal of an argument, between evidence to alter the language of a written instrument and evidence to define the position of the parties, and the nature and condition of the subject of the contract. So long as parties call on courts of justice to administer their contracts, they must expect them to be administered as nearly as may be according to the very intention and understanding that were present in the minds of the parties when the contract was signed, and to this end courts take the language employed, and apply it to the surrounding circumstances exactly as they believe the parties applied it." *Miller* v. *Fichthorn*, 7 Casey, 252, is an authority to the same general effect. In Pennsylvania, in the words of LOWRIE, C. J., "In consequence of our liberal allowance of set-offs, defalcations and equitable defenses, parol evidence is often admissible in an action on a written contract, in order to extend the field of inquiry to the whole transaction of which the particular contract forming the basis of the action constitutes a part." In an action on a contract for the sale of a colliery for a gross sum of money, to be paid at a certain rate per ton on each ton of coal mined therefrom, parol evidence is admissible to prove that at the time of the execution of the contract, it was agreed between the parties that the vendors should not be bound to mine the necessary amount of coal, and that the vendees should take the risk of their doing so: *Chalfant* v. *Williams*, 11 Casey, 212. The English rule that parol evidence is inadmissible to vary the legal operation of an instrument is not the law of this State: Id. A verbal promise by one of the parties at the making of a written contract, if it was used to obtain the execution of the writing, may be given in evidence. "This rule is put

upon the ground that the attempt afterward to take advantage of the omission from the contract of such promise is a fraud upon the party who is induced to execute it upon such promise": Per GORDON, J., in *Powelton Coal Company* v. *McShain*, 25 P. F. Smith, 238. Having been received, the evidence should not have been withdrawn. It had a legitimate bearing on the questions which the defendants had legitimately raised. With the other proofs it should have been submitted to the jury.

The fourth error is assigned to the failure of the court to charge that the plaintiff could not maintain this action without a previous tender of a deed for the coal property. While the property included three acres of surface, it seems obvious from the whole agreement, in the absence of explanatory testimony, that the parties treated it not as land but a mining right. The only consideration to be paid was half a cent per bushel for the coal that should be dug and delivered. No date was specified for the execution of the deed for even the ice pond lot. For that, $2,000 were to be paid "on the execution of the deeds and possession of the property." The contract contained no provision to secure the consideration for the coal lot. With such knowledge of the facts as the record affords, the failure to tender a deed can not be held fatal to the plaintiff's action. Such a deed in the ordinary form would scarcely meet the exigencies of a contract which partakes more of the nature of a mining lease than of a sale of land. The difficulties in the way of conveyance do not appear insurmountable. The property could be made subject to the consideration in the very words the parties employed, although, in the absence of stipulations, this could only be done by a fresh agreement, or by the terms of a conditional verdict.

Judgment reversed, and a venire facias de novo awarded.

MONROE ET AL. v. THE NORTHERN PACIFIC COAL MINING COMPANY.

(5 Oregon, 509. Supreme Court, 1875.)

Amendment in appellate court—Replication treated as complaint. An amendment will not be allowed in the appellate court changing a complaint on a *quantum meruit* into a complaint on a special contract; but where the defendant has set up the special contract in his answer, and the plaintiff has replied, the court will consider the issue as made on the special contract, the same as if plaintiff had declared on it.

Tunnel contract—Measure of damages. Upon an uncompleted contract for running a tunnel, the completion being prevented by reason of nonperformance of conditions by defendant, the measure of damages is the contract price per foot for the actual number of feet run.

Deferred payments. Where, by the terms of a contract, certain payments are deferred, such payments become due by operation of law whenever defendant commits a breach of the contract, such as prevents the completion of the work.

[1] **Breach of condition.** When, in the performance of a contract for labor, there are collateral conditions imposed on the party for whom the labor is done, the breach of such conditions justifies the abandonment of the contract by the laborer.

Appeal from Coos County.

This action was brought in the County Court of Coos to recover $780, alleged to be the reasonable value of work done in running a tunnel toward a coal mine, less three hundred and thirty-three dollars and thirty-three cents, already paid. The defendant denied an indebtedness, and alleged a contract, by the terms of which, in substance, plaintiff was to run a tunnel, of dimensions and length described, and at the rate of not less than one hundred feet per month; the defendant to furnish lumber, and provide tools and the use of a certain blacksmith shop, and to pay for the tunnel at the rate of twenty dollars per foot in length—one half upon the completion of each one hundred feet, and the remainder upon the shipment of the first cargo of coal after the mine was reached. The defendant further alleged that the required length of the tunnel was about three hundred and seventeen feet, and that the plaintiffs, after completing one hundred and seventeen feet thereof, abandoned the work, to the defendant's damage in the sum of five hundred dollars. Plaintiffs replied, admit-

[1] *Van Dusen* v. *Star Co.*, 36 Cal. 571; *Post* ——

ting the contract, but alleging that defendant failed to provide tools and the use of the blacksmith shop, and that by reason of such failure, plaintiffs were unable to complete the work. A trial was had in the county court, and a judgment rendered in favor of plaintiffs for four hundred and forty-six dollars and sixty-six cents, the amount claimed, from which judgment the defendant appealed to the circuit court. Upon the appeal, plaintiff, after leave obtained, amended his complaint, so as to set out the contract referred to, with the alleged breach by defendant, with an allegation to the effect that the defendant is a foreign corporation, and that the contract in question was made through its authorized agent, D. R. Dale. Defendant, answering, denied the alleged breach, but alleged that plaintiffs first violated the contract, to defendant's damage, etc., and alleging, further, that it had never executed a power of attorney, appointing an agent, as required by law, in order to authorize it to engage in business in this State, and that the contract, executed through Dale, was for that reason void. So much of the answer as related to the power of attorney was, on motion, stricken out. Plaintiffs obtained judgment for the amount claimed, and defendant appealed to this court. The errors relied upon in the appeal are stated in the opinion of the court.

J. F. WATSON, for appellant.

W. R. WILLIS, for respondents.

By the Court, BONHAM, C. J.

The first objection urged by counsel for appellant is, that the circuit court erred in allowing plaintiffs to amend their complaint by setting out the special contract entered into by the parties, and charging upon defendant a breach thereof, and by setting up a claim to recover for the labor performed by plaintiffs at the rate of compensation stipulated for in said contract; whereas, the original complaint in the county court showed a cause of action based upon implied assumpsit for the recovery of the reasonable value of the labor performed, and made no reference to the express contract set up and relied upon in the amended complaint.

The original complaint filed in the county court ignored the existence of any special or express contract, and only tendered an issue so far as the price for the labor performed by plaintiffs was concerned, upon the *quantum meruit*, and upon an issue joined on that allegation by a simple denial thereof, evidence of a fixed contract price would be inadmissible. After a trial in such case in the court of original jurisdiction, we do not think that the appellate court would be warranted in allowing an amendment which would change the issue from that of implied assumpsit to that of express contract. The object of the provision of § 533 of the Civil Code, that the trial in the appellate court shall be upon substantially the issues tried in the court below, is to enable the parties to come into the appellate court with their evidence for trial, and to protect the party who comes into court with a good pleading from unnecessary delay and expense in his litigation.

But the defendant in this case comes into the county court, and by his answer admits that the labor was performed, as charged by plaintiffs; but, in a plea by way of avoidance, alleges that it was rendered under a special contract, by the terms of which there was nothing due to plaintiffs, except three hundred and thirty-three dollars and thirty-three cents, which had already been paid to them, as the first installment on the first one hundred feet of the tunnel by them agreed to be constructed. The defendant, after further setting forth in its answer the terms of the special contract, charges that the plaintiffs wrongfully violated and abandoned their said contract, to the damage of the defendant in the sum of five hundred dollars, for which it asks judgment. By the reply of plaintiffs to this new matter in the answer, an issue was formed in the county court, between the answer and reply, which is substantially the same as that formed in the circuit court between the amended complaint and the answer thereto. While it is doubtless true that the portion of plaintiffs' reply in the county court which charges upon defendant a breach of the special contract referred to, was liable to objection, because inconsistent with the complaint, which makes no mention of a special contract, yet, we think, in the absence of any objection on that ground, that the reply ought to be regarded as presenting an issue upon that subject.

We think that the court below did not err in allowing the amendment to the complaint inasmuch as it only served to correct the form of the pleadings by presenting the mutual altercations of the parties in their correct and natural order.

The second objection to the proceedings of the court below, is to the effect that the court erred in sustaining plaintiffs' motion to strike out that part of defendant's answer to the amended complaint which alleges substantially as a matter of defense, that defendant had never complied with the law of this State requiring it, as a foreign corporation proposing to transact business here, to file in the clerk's office of the county where such business was to be carried on, a power of attorney designating a resident citizen of this State with authority to accept service of process, and on whom process might be served in all legal proceedings against such corporation.

It is claimed by counsel for appellant that in the absence of a compliance with the law in this respect by defendant (which in this case is conceded to be a foreign corporation), its contracts would be void. And it is further claimed that inasmuch as plaintiffs were allowed by the circuit court to amend their complaint by setting out their express contract with defendant, the defendant ought to be allowed to set up any defense which he might have that would show the invalidity of such contract.

This defense was in no way suggested by the pleadings in the county court, and, aside from the extremely doubtful legality of allowing a foreign corporation, under any circumstances, to come into the courts of this State and plead its own omission to comply with the requirements of our laws, we think that the interposition of this defense in the appellate court for the first time would be such a departure from the issues tried in the county court as could not be allowed under any fair construction of § 533 of the Civil Code. If this plea of the defendant was a good defense against plaintiffs' right to recover of the corporation it would have been but a simple act of justice on the part of defendant to have notified plaintiffs at the earliest opportunity of its intention to rely upon the same, so as to avoid any unnecessary expense of litigation. The third objection, that the court erred in admitting evidence of the levy on the blacksmith shop and tools of defendant,

by Harvey Howard, without proof of the attachment directing the same, we think is not well taken for the reason that we find nothing is the bill of exceptions showing that the error complained of was committed. The use of the blacksmith shop and necessary tools to prosecute the work of opening the tunnel were to be furnished plaintiffs by defendant. It appears from the bill of exceptions in this case that plaintiffs attempted on the trial to show that in an action by attachment against the defendant, the tools and blacksmith shop which defendant had furnished plaintiffs under the terms of the contract to use while so at work, were taken from them, and that they were deprived of the means of prosecuting such work further, and for that reason they abandoned the same and thereafter treated the contract as rescinded. On this subject it appears that a question was propounded to Wm. Hunter, a witness for plaintiffs. The question, as reported in the bill of exceptions, is a little vague, probably from an error in copying the transcript. By supplying the following words inclosed in brackets the question will be intelligible and will read as follows: "State [what you know concerning] the blacksmith shop and tools being levied on, under an attachment against defendant by Harvey Howard, an officer?" The "defendant objected to this question for the reason that no attachment was produced or proven, and that Harvey Howard was not shown to be an officer authorized to serve a writ of attachment." "The court overruled the objection and admitted said evidence, and defendant by its counsel then and there excepted to said ruling."

The foregoing is all that the bill of exceptions discloses regarding the subject of the levy on the blacksmith shop and tools in question, to which counsel for defendant objected. The question was objected to, the objection was overruled and the evidence admitted. But the bill of exceptions gives no intimation as to what the answer of Mr. Hunter to the question was, if in fact, he knew anything on the subject.

A conclusion that the court below erred in this respect could not be predicated upon so vague and indefinite a showing as this. This brings us to the consideration of the objections made by appellant to certain instructions of the court, and the exceptions taken to the refusal of the court to

give certain special instructions asked for by counsel for appellant. But before proceeding to refer to the instructions given and refused, to which exceptions were taken by appellant, let us see what issues of fact were by the pleadings presented to the jury for trial.

The complaint, as amended in the circuit court, shows an action for damages upon a special or express contract for labor to be performed by plaintiffs, and charges a breach of contract on the part of the defendant, by reason of which the plaintiffs, after having performed a part of the work contracted for, were prevented from completing the same, and on account of which they claim a rescission of the contract and the right to recover from the defendant the full contract price agreed upon, for the work already performed. The defendant, admitting the terms of the contract, denies the breach thereof on its part, and charges a breach of the same by plaintiffs.

The plaintiffs' right to recover the amount claimed by them in this action only depended upon the finding by the jury in their favor on the issues as to the violation of the contract by defendant.

We think that the contract price of twenty dollars per yard in length of the tunnel completed by plaintiffs, is the just measure of damages sustained by them on account of a breach of the contract by defendant. The measure of damages under the pleadings in this case becomes a mere question of law, so far as the plaintiffs' claim is concerned, if the defendant committed a breach of the contract as charged. The bill of exceptions shows the following instructions asked for by counsel for appellant, and refused by the court:

1. "The plaintiffs can only recover in this action what the evidence shows to be due them on the contract set up in the pleadings." This instruction, we think, was not sufficiently qualified, and was calculated to mislead the jury, for the reason, that, by the literal terms of the contract referred to, one half, or ten dollars per yard for the work done by plaintiffs, would not become due until after the completion of the tunnel and the shipment of a cargo of coal from the mine had been made. We think it is fairly to be inferred from the terms of the contract set out in the complaint that defend-

ant's coal mine had not been opened so that coal could be procured for shipment, and that it was the understanding of the parties that the cargo of coal referred to in the contract was not to be shipped until after the completion of the tunnel which plaintiffs agreed to construct. Although, by the literal terms of the contract, without reference to its violation by defendant, plaintiffs had already been paid all that was due them thereon, yet by operation of law the deferred payments became due as soon as defendant committed a breach of the same so as to prevent plaintiffs from completing the work. To hold otherwise would be to say that plaintiffs, without any fault of theirs, should lose one half of the price of their labor as agreed upon: *Hale* v. *Trout*, 35 Cal. 229.

It was urged by counsel for appellant that it would not be just to allow plaintiffs to recover the same price, for the first one hundred yards of the tunnel, as for the second and third one hundred yards, for the reason that the construction of the first one hundred yards would be less difficult and expensive than the second and third. It is an answer to this that there was no issue made by the pleadings as to the relative cost of the different parts of the tunnel; the contract makes no distinction in this respect, and the court, we think, could not make any.

The second and third instructions refused by the court, are as follows:

2. "By the terms of that contract, upon the completion of the first one hundred feet of the tunnel, but one half of the price became due, to wit, three hundred and thirty-three dollars and thirty-three cents.

3. "The remainder of the price for said one hundred feet did not and can not become due until the first cargo of coal can be shipped." In view of the conclusion already arrived at, as to the just measure of damages in a case like this, the correctness of the court in refusing to give the last two instructions we think is sufficiently apparent. Other instructions, embraced in the bill of exceptions, requested to be given by counsel for appellant and refused by the court, we do not deem it necessary to take time to here set forth or refer to, further than to say that we think they come clearly within the purview of the rules by which those already enumerated were

properly refused. The following instruction was given by the court, to which counsel for appellant excepted, and which is assigned as error, to wit: "There has been something said by counsel in this argument about the form of the action in this case. Under our statute, the distinction heretofore existing between forms of actions at law is abolished, and all that is required is that the complaint shall contain a plain and concise statement of the facts constituting the plaintiffs' cause of action; and in this case, if you believe from the evidence that the plaintiffs complied with the contract mentioned in the pleadings in running the first one hundred feet of the tunnel, and that the defendant first violated the contract so as to render it impossible for the plaintiffs to comply with it in further prosecuting the work, then they have a right to recover in this action for the value of the work they have done, and that value must be ascertained from the evidence."

The concluding portion of this instruction we think was technically incorrect, for the reason that this is not an action by plaintiffs to recover the value of their services rendered, as upon a *quantum meruit*, but is an action to recover the price agreed to be paid by the terms of the contract between the parties. It does not appear from the bill of exceptions that there was any testimony given at the trial as to the reasonable value of the services of plaintiffs, and it was not necessary, under the pleadings, that any should have been given to entitle them to recover; if the jury found that the contract was broken by the defendant the court might properly have said to the jury: "If you find from the evidence that the terms of the contract, set up in the complaint, were violated by defendant on its part, so as to prevent plaintiffs from going on and completing the tunnel in question, then you will find for the plaintiffs in the sum of four hundred and forty-six dollars and sixty-six cents, as claimed by them."

The jury must have found that the contract was broken by defendant in order to have found for the plaintiffs in any sum; and as they only returned a verdict for four hundred and forty-six dollars, and sixty-six cents, the error complained of could not have operated to the prejudice of any substantial right of appellant.

The judgment of the court below should be affirmed.

ERWIN DAVIS v. FLAGSTAFF SILVER MINING COMPANY OF UTAH (LIMITED) ET AL.

(2 Utah, 74. Supreme Court, 1877-80.)

Action on contract to enforce a lien, and for injunction and receiver. The plaintiff, E. D., brought suit against the F. S. M. Co. (limited), a corporation organized under the "Companies Act" of Great Britain, and others, alleging a purchase of ores to be mined from its mine in Utah Territory and delivered to him at rates fixed by the contract, which was evidenced by sale rates of the kind called in England "bought and sold" rates, and a breach thereof, by failure to deliver; also that he had advanced to the company $57,800, as payment on said ores—and by a subsequent contract, which was in writing, between the plaintiff and defendant company, he had acquired a lien on defendant's mines and property. The other parties defendant were made such because they were alleged to have some claim by judgment lien, or otherwise, upon the company's property, which liens were alleged to be subsequent in time and subordinate to plaintiff's alleged lien, for ores not delivered. The plaintiff had a decree in the district court for $290,000 and interest, and an injunction was granted against defendant company and its lessor, F. W. B., and he was appointed trustee or receiver, to take possession of and work the company's mines, until the said debt to E. D. was paid off from profits, and also fixing the priorities of other creditors' liens and providing for their payment accordingly. *Held*, first, that the evidence showed that the plaintiff, E. D., had loaned to the directors of the company the sums named in the ore contracts, to pay unearned dividends, and such loans being forbidden, all the parties to the contract, knowing the purpose for which such dividends were made and used, they were fraudulent and void. *Held*, second, that the contract upon which plaintiff claimed to found a lien, was based on the ore contracts, and that the stockholders having never ratified the ore contracts, or the contract providing for their payment, they were fraudulent and void, as against the company and the other defendants. *Held*, third, the directors of the corporation had no power to ratify the ore contracts.

Power of corporation. A corporation has no powers except such as are granted by its charter or by necessary implication.

Limit of power in case at bar. The defendant company was limited in its power to negotiate loans by its articles of association, and the directors had no authority to borrow money beyond that granted, and in the manner specified; and it was prohibited from paying dividends, except from profits.

Notice of powers of corporations. The plaintiff, E. D., was not an innocent party. Actual knowledge that the company had no power to make the loan is not necessary to be shown. He is bound to take notice of the directors' powers, for it is found that in the case at bar the plaintiff had knowledge of the want of power on the part of the directors, as

he was an incorporator, and one of the first board of directors. He was a dealer in stock of this and like companies, and must have known the extent and scope of the company's power.

Contract for a lien. The subsequent contract for a lien on the mine construed and held not a lien, but void and no mortgage.

Irrevocable power of attorney. An effort in such contract to make one "P." the irrevocable agent of the company, *held*, to be beyond the powers of the corporation or directors, and void.

Effects of an irrevocable power of attorney, made by corporation. The attempt of a board of directors to grant an agent of the company an irrevocable power of attorney, is a virtual dissolution of the corporation, and is therefore void. A corporation can only be dissolved in the manner provided by law.

Appointment of a receiver for corporation. Courts of equity have no power to appoint a receiver for a corporation in the absence of a statute conferring such power.

Another action pending. Where another action between the same parties is pending, a plea to that effect will cause a dismissal of the second suit.

[1] **Mutuality of contract.** Where, by the terms of a contract, one party is bound to do a certain thing, and the other can perform his part at his own option, the contract is not mutual or binding on either party.

Appeal from the Third Judicial District Court.

The facts appear in the opinion.

SUTHERLAND & MCBRIDE, for the Flagstaff Mining Company.

R. N. BASKIN, for Baskin & DeWolfe, defendants.

BENNETT & HARKNESS, for respondents.

BOREMAN, Justice, delivered the opinion of the court.

The appellant, the Flagstaff Company, was incorporated in England, to acquire, hold and operate mining and smelting properties in Utah. The respondent sued the company, alleging the purchase of ores from it, and the non-delivery thereof; also that he had advanced money to said company, and that a contract was entered into by and between the company and himself, whereby he acquired a lien upon the properties of the said company in Utah, and he asked the enforcement of said contract, and that a receiver be appointed. The other defendants were made parties because they were supposed to hold liens against the property of the said company.

[1] *Finerty* v. *Fritz*, 1 M. R. 438.

The court below entered a judgment appointing a receiver, and requiring defendants to surrender possession of the property to the receiver, and enjoining them from interfering with the receiver in his holding, working and disposing of the property; said judgment also fixes the priorities of the alleged lien holders, and requires the receiver to pay off the liens, and to pay to respondent two sums, together amounting to $290,000 and interest.

The defendants, the Flagstaff Company and F. W. Billing, appealed from the judgment of the court below, and from the order of the court overruling the motion of said company and said Billing for a new trial.

It appears that the respondents, by arrangements with the directors of the said company, had loaned the company very large sums of money, which was to a great extent, if not entirely, used in paying dividends. Subsequently the character of these loans was sought to be changed, and thus was created what are now offered as "ore contracts." And thereafter the alleged contract of December 13, 1873, was entered into by said company through its directors, and by said respondent in person. This alleged contract of December 13, 1873, called "Exhibit A," was based upon the ore contracts and directed their payment.

It seems clear that there was no affirmative action of the stockholders ratifying or approving either the loans, the ore contracts, or the contract of December 13, 1873. Whatever there was in their conduct supposed to bear such a construction, was of a negative character. But in such matters, a corporation must be judged by its acts, and not by its failures to act. It can not be said to approve that which it simply failed to disapprove by express words. There was no direct action in the nature of ratification.

It seems equally clear, as was decided by this court in another suit at a former term, in which suit said Flagstaff Company was plaintiff and said respondent (with others) was defendant, that the directors alone had no power to act.

The question reverts back to the powers of the body of the corporation itself. A corporation has no powers but such as are granted either in express terms or by direct and necessary implication. This company had no power granted to it to

make loans of money, except under special limitations, as designated in section 20 of the "Articles of Association" of said company. There was no affirmative grant to the company to make such loans as were made, and not only so, but this section 20 has the force and effect of an express limitation upon its powers. The loans were far in excess of the amounts authorized. The use of the money to pay dividends was in violation of the acts of parliament, called the "Company's Acts." By these acts this corporation is prohibited from declaring any dividends "except out of the profits arising from the business of the company." Dividends paid out of borrowed money were not paid out of "profits." Thus the company had no grant of authority for using the borrowed money to pay dividends, but it was in fact expressly prohibited from so doing.

It could not be said that respondent was an innocent party, and should not be held responsible for any exercise, by the company, of powers not granted, or of powers prohibited. Actual knowledge of the want of authority in the company is not necessary to be shown. In dealing with the company, as respondent did—being a party to an executory contract—he must see to it that the company has the powers it claims to have. In the instance before us, we have no doubt that the respondent was fully aware of the corporate powers of the company. He was one of the incorporators of the company and one of its first directors. He owned and bought and sold large amounts of its stocks. He was a stock broker and manipulator of stocks. He went to London with letters that gave him "a good position" (to use his own language), and he says that "In London the way of operating is very different from here, *decidedly old fogyish. They did not understand bulls and bears on the stock exchange.* A man would go a bear a thousand or two pounds there, and make as much disturbance about that as a man in America would a million." It was right in the line of his business to know the powers of these stock corporations. The large dividends from the borrowed money increased the market value of the stocks, the public supposing that the company was doing a legitimate business,and paying dividends out of "profits." Such people "did not understand bulls and bears on the stock exchange."

A shrewd manipulator of stocks could afford to run the risk of losing money loaned to a company to be used to pay dividends, when he knew that he could receive it all back, and much more, too, by the sudden rise in the price of the stocks.

The evidence shows that the directors at that time were acting in entire harmony with the respondent, and willing always to comply with his wishes. The respondent did not propose to lose the money advanced, and hence the claims were put into the shape of "ore contracts." A change of shape did not change the substance, however. Being based upon fraudulent and void loans, they were necessarily also fraudulent and void.

But let us assume that no loans ever were made, and that the ore contracts were original and not based upon prior transactions between the parties. The receipt of forward payments for ores to be delivered in future, as specified in these contracts, was beyond the powers of the corporation. The company has no grant of authority to thus bulk its expected productions and involve the company to its ruin by subsequent inability to comply with the terms of the contract.

Money arising from such forward payments for ores, could not legally be used to pay dividends. Such money was not "profits arising from the business of the company." The money might be termed *anticipated* profits, but we nowhere find any authority for the company declaring dividends out of any profits except such as are realized out of the business "arising out of the business" of the company. And it is against public policy to allow corporations to thus deal so as to deceive and defraud the people. An unscrupulous directory or company might have no ores, and yet sell ore for ten, twenty or more years ahead of the production thereof, and use the money thus acquired in declaring one or two dividends of enormous size. Those knowing the inside workings of the company could sell off all their stocks at enormous profits and leave the company bankrupted and in the hands of those who were deceived and defrauded into buying the stocks. Courts can not look with any favor upon claims for such powers in corporations.

These ore contracts were the basis of the alleged contract of December 13, 1873, "Exhibit A," upon which this action is

brought. As the ore contracts were invalid, and not within the power of the corporation to make, it follows that no action of the company could give them vitality. Their recognition in this contract does not, therefore, give them validity. If it be admitted that the ore contracts were *bona fide* and binding, what is there in the nature of "Exhibit A" to warrant the statement that it gives a lien or security to respondent upon the company's properties in Utah, for the fulfillment of such ore contracts? It nowhere says that a lien is given, nor that a security is given. It nowhere says that anything is given to respondent, except the power to appoint an irrevocable agent of the company.

The company had refused to give the property into respondent's hands as security or for any other purpose. It also refused to give him a mortgage. The company, therefore, never intended to give respondent a mortgage, nor to give him possession of the property. What did it intend to give? It simply intended to give him power to have an agent of his selection control the property of the company at the company's expense, and without the company having power to remove the agent or to help itself in any way. Take that power out of this contract and there is nothing left that did not exist before the contract was made. The obligation to deliver the ores existed before this contract was made, and if binding at all, it was just as binding before this contract was entered into as it was afterward. No new powers or rights were given respecting the ores, except that of the irrevocable agency. To create an irrevocable agency, and to give the respondent the sole power of the removal of such agent and of appointing his successor, might be a lien, if valid; but the court below very properly said, that so far as the contract purports "to create an irrevocable agency" "it is not binding on the company." A corporation can not, by such agency, put beyond its reach, the power to do that for which it was brought into existence. This company was created to own and work mines and carry on smelting in Utah Territory. To create an agency to do this without the power to revoke the authority, and with such power put into the hands of a stranger, is to virtually dissolve the corporation. For it has no power to do that for which it was created. A corporation can not yield up its life in any

such indirect manner. If it be desirable that its business be wound up, the law points out a way for this to be done.

Liens are of two kinds—liens at law and such as are recognized by courts of equity. A lien at law exists when the party has the right to the possession of the property of another until some existing claim upon it is extinguished. Make the agency revocable at the pleasure of the company, and there is nothing left in the contract to show that respondent had any right to possess the company's property for any purpose.

A lien, as known in courts of equity, is used to denote merely a charge or incumbrance of one person upon the property of another, but not in possession.

The agent was directed to deliver ores to respondent. But the right to the ores existed before this time, if at all. They were paid for, and respondent was entitled to them before this contract was made. The contract only adds a direction to its own agent to deliver them—and this agency itself is admitted to be within the power of the company to revoke, and there is no obligation in the contract to appoint another agent, but it is in express terms forbidden to do so. The whole contract, therefore, resolves itself back again simply into a recognition of the validity of the ore contracts, whilst such validity existed before this contract was executed.

There was nothing in the nature of trust relation between respondent and the agent. If a trust existed, then respondent had the right to compel the company to make the appointment, and not only so, but such appointment must be satisfactory to the respondent. Yet we have seen that the agency sought to be created here, was revocable at the pleasure of the company, and there was express prohibition upon the company to appoint a successor. If we say that a trust relation existed, therefore, the court must make a new contract for the parties, and not such as they desired or intended.

This contract, "Exhibit A," was not one of mutuality. It was made to bind the company but not the respondent. He could ignore it at pleasure and sue on the ore contracts alone, but no such power of repudiation was granted to the company. Respondent could decline to receive the ores, but the company could not refuse to deliver them. And as we have

seen, the company could not remove the agent of its own appointing, but the respondent could do so.

There was no consideration for this contract, so far as the ores were concerned, and all of that part for which there was consideration, was settled and satisfied before this action was brought.

We, for the reasons stated, do not think that respondent has a claim upon the company for the enforcement of this contract, "Exhibit A," sued upon, nor is he entitled to damages for its breach or non-fulfillment.

The main feature of the judgment in this case is that of appointing a receiver. Everything else in it is made subservient to this one matter—is secondary to it.

Our statute provides for the appointment of a receiver "by the court in which the action is pending, or by the judge thereof." There must be an action pending in which a receiver is asked to be appointed: Compiled Laws, 1870; Practice Act, § 145.

If there be an action pending, the court is authorized to appoint receivers in three general classes of cases. It may appoint the receiver *before* judgment, to preserve the property until judgment. It may appoint one "after judgment to dispose of the property according to the judgment, or to preserve it during the pending of an appeal"; or, it may appoint "in such other cases as are in accordance with the practice of courts of equity jurisdiction": Compiled Laws, 1870, p. 438.

In the case at bar, the appointment is neither before judgment nor after judgment, in the sense contemplated by this section of the statute. It is not before judgment in the "action pending," because the judgment of which it is a part is the final judgment in the case. It is not after judgment, (1) for the purpose of preserving the property during appeal, because no appeal had been taken when the appointment was made, but the appeal was afterward taken from the very judgment itself appointing the receiver; (2) nor was it after judgment, in order "to dispose of the property according to the judgment." No judgment preceded the appointment requiring any property to be disposed of in any particular way. The appointment is not in aid of any prior judgment. Possibly it might be claimed that the judgment of which it is

in aid, is part and parcel of the judgment in which the appointment of the receiver is made, and that the vital part of the decree was that granting relief to respondent, which the receiver was to carry out by disposing of the ore and paying the respondent. Perhaps a judgment for general or specific relief might be followed in the same entry by the appointment of a receiver to carry out such judgment by disposing of the property according to the judgment. But that is not this case. No general or special relief is granted to respondent in this decree, which the receiver is directed to carry out. He is directed to pay certain liens prior to those of respondent. But there is no judgment in this case for such liens as against the company. They are simply recognized to exist prior to that date. He is required to pay respondent certain sums of money, but there is no judgment in favor of respondent and against the company for such sums. The respondent does not to-day have any judgment against the company that the receiver is authorized to carry into execution. We do not think that the authority for the appointment of the receiver can be found under the third general head—that of general equity jurisdiction. Courts of equity ordinarily will not take the management of the affairs of a corporation out of the hands of its own officers and intrust it to the control of a receiver of the court, upon the application of either creditors or shareholders: High on Receivers, § 288.

A court of equity has no power to dissolve a corporation without statutory authority, and then the statute must be followed. To appoint a receiver prevents the corporation from exercising its powers, and virtually winds it up.

The judgment in this case is for the appointment of a receiver and for nothing else, except that which is incidental thereto. He is appointed, and directed to carry into execution a certain contract. As that can not be done according to the terms of the contract, he is directed to pay money instead of ores. The defendants are enjoined from interfering with the receiver, and required to deliver certain property to him. The judgment, being solely for the appointment of a receiver and for matters incidental thereto, and not being made in compliance with either provision of the statute, was improper.

The plea of another action pending is good. The injunc-

tion in this case is utterly at war with the injunction in that case. The appointment of the receiver is likewise to render nugatory the judgment in that case. There is nothing in the judgment or opinion of this court in the former case of the defendant, *Flagstaff Company* v. *Davis et al.*,[1] which would warrant the assumption that the court did, or intended to, allow respondent to institute a new suit and have a re-trial of the issue settled there in that case.

There are various other points presented by this case, but as those questions which we have passed upon are decisive of the case, we shall not consider the others. The judgment and order of the court below are reversed with costs, and the cause is dismissed.

EMERSON, J., concurs.

SCHAEFFER, C. J., dissented, as follows:

In this case I can not concur with the majority of the court, because I think the testimony in this case shows a ratification by the stockholders of the ore contracts made by the directors with the plaintiff, and that the contract, "Exhibit A," creates an equitable lien upon the mine which the plaintiff is entitled to have enforced by the appointment of a receiver or trustee by the court.

BOREMAN, J., delivered the opinion of the court on the appeal as to defendant McCormick.

The action of the court below in allowing the liens of respondent to take priority of that claimed by appellant, was proper, for the reason that appellant did not have any lien, and for other reasons; but as the whole judgment has been reversed by this court in the case just decided, *Erwin Davis, respondent*, v. *Flagstaff Company et al., appellants*, and the cause dismissed, this portion of the judgment follows that ruling, and it is therefore reversed and the cause dismissed at cost of appellants.

EMERSON, J., concurs.

SCHAEFFER, C. J., dissents.

[1] Styled *Flagstaff Co.* v. *Patrick*, 2 Utah, 304; *Post* CORPORATIONS.

BOREMAN, J., delivered the opinion of the court on the appeal, as to defendant McBride.

The judgment of respondent was prior in right to any claim of appellant. The action of the court in granting him a new trial, therefore, was proper. The action of the court below is affirmed, but the cause is dismissed at appellant's costs, in accordance with the decision of this court in the case of *Erwin Davis, respondent*, v. *Flagstaff Company et al., appellants*, this appeal being in the same case.

EMERSON, J., concurs.

SCHAEFFER, C. J., dissents.

BEARD ET AL. v. CONVERSE.

(84 Illinois, 512. Supreme Court, 1877.)

Clause in contract construed. C. agreed to pay B. a certain sum of money on condition that B. would deed to an iron company what land they wanted for steel works, and would also procure from the iron company a contract to take from C. such quantities of coal as might be required for their steel works. B. also owned the coal banks worked by C., and received a royalty upon all coal taken therefrom. B. deeded the necessary land to the iron company and procured from it the contract for coal for the benefit of C., but the latter refused to sign the contract because it contained a clause that in the event of a failure by C. to furnish the requisite amount of coal, B. might bring suit at his own proper costs and expenses for such neglect. *Held*, that this clause did not impose any additional burden upon C., nor vary the terms of his contract with B.

Statute of frauds, how pleaded. It is a general rule, if a party would avail himself of the statute of frauds as a defense, he must plead it, but when the declaration contains only the common counts and yet the plaintiff seeks to recover for the agreed price of realty, the statute may be relied upon as a defense under the general issue, because it can not be known before the evidence is introduced that any contract within the statute will be proved, but the contract as above set out is not within the statute, and the question of the statute of frauds does not arise in this case.

Videlicet. The amount agreed to be paid being laid under a videlicet, it is not necessary to prove the exact sum stated.

Action for damages for refusal to execute a contract, and judgment for plaintiff obtained in the Circuit Court of Sangamon County, from which defendants appealed.

The declaration contained only a single count based upon facts substantially as follows: The defendants agreed in consideration of the donation by plaintiff to the Springfield Iron Company of certain lands for their steel works, and of his obtaining a contract from the iron company to take from defendants such quantities of coal as they might require in and about their steel works upon the same terms and time as upon contracts then existing between defendants and the iron company relative to supplying them with coal, the defendants would pay to plaintiff a sum of money stated in the declaration at $2,000. The contract further stipulated that defendants should deposit with the secretary of the iron company the amount of $1,125 to be paid to plaintiff when the deed was delivered for the land and the contract signed by the respective parties. The defendants deposited a check and notes to the amount named but refused to sign the contract because it contained a clause giving plaintiff the same right to sue defendants for any breach of the contract to furnish coal which the iron company had. Plaintiff's right to have this clause in the contract was based upon the fact that he owned the mines worked by defendants, and was to receive a royalty upon all coal taken out. The defendants pleaded only the general issue but the evidence showed that they relied upon the statute of frauds.

STUART, EDWARDS & BROWN, for appellants.

JOHN M. & JOHN MAYO PALMER, for appellee.

By the Court, SCOTT, J.

The making of a contract with plaintiff to pay him a certain sum if he would deed to the iron company what land they wanted as a location for steel works to be constructed, and secure from that company an agreement to take from defendants coal, in such quantities as might be required for the additional works of the company, upon the same terms and for the same period as specified in the original agreement be-

company to take coal from them on the terms of their original agreement, which they deemed of value, and whether it was or not was their own concern. No valid reason is shown why they should not pay the price agreed upon.

There is no variance between the agreement declared on and the one proven. The amount defendants agreed to pay plaintiff was laid under the *videlicet*, and he was not bound to prove the exact sum stated.

Other questions of minor importance have been discussed, but, as they do not affect in any manner the merits of the case, we have not deemed it necessary to remark upon them.

The judgment will be affirmed.

Judgment affirmed.

SHEPLER v. SCOTT.

(85 Pa. St. 329. Supreme Court, 1877.)

Broker's license. One who brings an action to recover compensation for procuring a sale of coal lands under a special contract need not show that he had a license to act as a real estate broker.

[1] **Reasonable time—Question for jury.** If a contract is silent as to the time within which an act is to be performed, the implication is that it should be done within a reasonable time, and what is a reasonable time is a question for the jury to determine

Parol evidence to limit time. Evidence that a written contract was limited by parol to a particular time must be both positive and clear.

Error to the Court of Common Pleas of Westmoreland County.

Covenant by Joseph H. Scott against Davis Shepler on the following instrument:

"Agreement made this 6th day of May, 1874, by and between Joseph H. Scott of Washington county, Pennsylvania of the one part, and Davis Shepler, of Westmoreland county, Pennsylvania, of the other part, witnesseth, that the said party of the first part, for the consideration hereinafter mentioned, is to use his best endeavors to sell for the said second party one hundred and twenty-six acres of coal, more

[1] *Luckhart* v. *Ogden*, Ante 602.

or less, situate in Rostraver township, Westmoreland county, and in case of sale of said coal by said first party or from his efforts to sell the same, the said second party hereby binds himself, his heirs and executors to pay to the said first party all that the said property shall be sold for over and above $50 per acre. In witness, the said parties have hereunto set their hands and seals this 6th day of May, 1874.

(Signed) "DAVIS SHEPLER. [SEAL]
"JOSEPH H. SCOTT. [SEAL]"

Defendant pleaded *non infregit conventionem;* covenants performed *absque hoc, etc.*

The facts are mainly stated in the opinion of the court.

The second point of plaintiff, which the court, LOGAN, P. J., affirmed, was as follows: "If the jury find that the plaintiff was the procuring cause of the sale, he would be entitled to recover under his contract, unless it had terminated by lapse of time, or was rescinded before the sale to Moses Scott."

In their general charge the court said: "There is, however, a further question, which is one particularly for you. The defendant, Davis Shepler, insists that this contract, instead of being, as written upon its face, without any limitation as to time in which the sale is to be made, was limited to a period of three weeks, and that it was agreed between the parties at the time the paper was made that Joseph Scott should only have three weeks in which to consummate the sale, and at a time before the sale the parties met, and it was agreed between Joseph Scott and Davis Shepler, that the sale not having been made within the three weeks, the paper was declared off, and it was so agreed between them. If this fact be so—if you are satisfied under all the testimony in the case that it is so, that will defeat the right of the plaintiff to recover. In determining that, you will look at all the testimony in the cause. The paper is with the plaintiff; the contract as read is as it is alleged to have been by the plaintiff. The burden, therefore, rests with the defendant to satisfy you by positive and clear testimony that the contract embraced the terms the defendant says it did, and not recited in the paper; that the time was limited to three weeks, and at the end of three weeks they agreed to give up that paper. You will scan all the testimony in the cause, and say whether the defendant has satisfied you by clear and positive proof of the fact that it was limited to three weeks,

and the contract declared off at the end of three weeks. If he had insisted upon the paper conveying simply the coal at the time, he ought to have stood upon it, or at least given Joseph Scott notice of it, and an opportunity to be heard. There is no evidence that he did give such notice, and if the facts are so, as they seem to be under the testimony in the cause, then this matter of additional privileges would not be considered an element of defense on the part of the defendant."

The court reserved the question whether the failure of the plaintiff to show the fact that he had a license as a broker, either under the law of the United States or of Pennsylvania, defeats the right of action.

The verdict was for the plaintiff for $600, and the court subsequently overruling a motion to enter judgment for defendant *non obstante veredicto*, he took this writ, assigning this refusal to enter judgment, the answer to plaintiff's point, and the portion of the charge noted, for error.

HENRY D. FOSTER, for plaintiff in error.

H. P. LAIRD and H. C. & J. A. MARCHAND, for defendant in error.

STERRETT, Justice, delivered the opinion of the court.

According to the terms of the contract executed by the parties on the 6th day of May, 1874, the plaintiff below agreed to use his best endeavors to sell, for the defendant, one hundred and twenty acres of coal, and in case of sale by him, "or from his efforts to sell," the defendant agreed to pay him all that it should "be sold for over and above $50 per acre." On the 4th of August following, the coal was sold, by articles of agreement, to Moses Scott for $55 per acre, and the plaintiff, claiming that the sale had been effected by his agency, demanded $600 as compensation for his services rendered, in pursuance of the contract.

The main grounds of defense were that the time, within which the plaintiff was authorized to negotiate a sale, was limited to three weeks, and had expired before Moses Scott agreed to purchase; that the sale to Moses Scott embraced grants and concessions, by the defendant, which the plaintiff was not au-

thorized to make in any sale he might have effected under his agreement with the defendant and that the plaintiff could not recover without showing that he had a license to act as a real estate broker.

The question of law involved in the last mentioned ground of defense was reserved, and afterward rightly decided in favor of the plaintiff below. Under the pleadings his right to recover did not depend on proving that he had a license, and, aside from this, there was no evidence that the plaintiff was engaged in the business of a real estate broker, as an occupation, or that he held himself out to the public as such.

The court was clearly right in affirming the plaintiff's second point and thereby instructing the jury that if they found "the plaintiff was the procuring cause of the sale he would be entitled to recover under his contract, unless it had been terminated by lapse of time, or was rescinded before the sale to Moses Scott." The questions of fact upon which the case mainly turned were thus fairly presented and submitted to the jury. If the sale to Moses Scott was negotiated by the plaintiff, or resulted from his efforts, he was entitled to the compensation fixed by the agreement, unless the jury found from the evidence that the contract had previously expired by limitation, or had been rescinded by the parties. The contract itself is silent as to the time within which the plaintiff was authorized to negotiate a sale, but the implication of law would be, that it should be done within a *reasonable* time, and this would be a question for the jury. The defendant, however, contended that when the contract was signed, it was expressly agreed that the time should be limited to three weeks; that afterward, the plaintiff requested an extension of time, which was refused, and it was then mutually understood that the contract was no longer in force. Testimony bearing on this point was offered by both parties, and submitted to the jury with instructions as to the nature of the proof required to establish the limitation contended for by the defendant. This portion of the charge is assigned for error.

After stating to the jury what was claimed by the defendant as to the limitation agreed upon at the time the contract was executed, etc., the learned judge instructed them, that if they were satisfied from all the testimony in the cause that

the facts were so, the plaintiff could not recover; that the written contract, as it stood, was with the plaintiff, and therefore the *onus* was on the defendant to satisfy them by "positive and clear testimony" that the time was limited to three weeks; that they should "scan all the testimony in the cause," and say whether the defendant had satisfied them "by clear and positive proof, of the fact that it was limited to three weeks and then declared off." After referring to the conflicting testimony of the parties themselves, and the corroborative testimony introduced on both sides, he concluded by saying "all these circumstances you will take into account in determining whether or not the contract is as written, or whether it is as claimed by the defendant."

The plaintiff in error has no reason to complain of this branch of the charge. The testimony was fairly submitted to the jury, with proper instructions as to the character of the proof that was required to sustain his position. While the parol testimony introduced by him did not contradict anything expressed in the written contract, its purpose was to restrain its operation as to time, and thus vary its legal effect. In such cases it is not requiring too high a degree of proof to say that the testimony should be clear as well as positive. It should undoubtedly be clear, and there is no reason why it should not be positive also, as contradistinguished from testimony of a negative character. It is in this sense that the instruction would be understood by the jury. None of the testimony was withheld from the jury. They were instructed, as we have seen, to carefully consider it all, and take into account all the circumstances; and if they were satisfied, "by clear and positive proof," that the time was limited to three weeks, they should so find. This was quite as favorable as the plaintiff in error had a right to ask. We find no error in any of the assignments.

Judgment affirmed.

KENNEDY ET AL. V. SCHWARTZ.

(13 Nevada, 229. Supreme Court, 1878.)

Ore contract construed. K. agreed to sell and deliver to S. 1,000 tons of ore for which S. agreed to pay $10 per ton, and for all ore having an assay value in excess of $60 per ton, one half of the value of such excess, in addition to the $10 per ton. *Held*, that the assays of all the ore delivered, should be averaged; and that K. could not recover the assay value of separate lots in excess of $60 per ton without taking into account the general average of all ore received.

Difference in assays. A refusal by S. to adjust a difference in the assays as provided in the contract, would justify the court in adopting the plaintiff's assay if found to be correct. Neither party ought to reap a benefit by a failure to comply with the terms of the contract.

Indivisible contract—Amount recovered. If plaintiffs were ready at all times to deliver the ore according to contract, and defendant failed to comply with its provisions, they would be entitled to recover the contract price for all ores delivered. But if defendant was ready and willing to receive the full 1,000 tons, in lots of 100 tons, as provided in the contract, but plaintiffs, notwithstanding the capacity of the mines enabled them to do so, refused to deliver the ore, they could only recover for each 100 tons indivisible, and would be liable for damages for breach of contract.

Appeal by Schwartz, from the District Court of White Pine County, Sixth Judicial District.

J. B. BARKER, for appellant.

R. D. FERGUSON, for respondent

By the Court, HAWLEY, C. J.

The plaintiffs, Kennedy and Young, on the 14th of August, 1876, were the owners of the Crown Point and Vulcan mines, situate in Hunter mining district, White Pine county. The ores in the Crown Point mine were of high grade in silver, and of low grade in lead. The ores in the Vulcan mine contained a heavy per cent. of lead, but were of low grade in silver, and were valuable to be used as a flux in the smelting of other ores. The defendant, Schwartz, was the lessee of a smelting furnace at Robinson, and was desirous of procuring ores that would enable him to run the furnace with profit.

After examining the character of the ores in the Crown

Point and Vulcan mines, negotiations were entered into which resulted in the making of a written contract, by the terms of which the plaintiffs, as parties of the first part, agreed to deliver to the defendant, as party of the second part, within three months after the 1st day of September, A. D. 1876, at the dumps of said mines, one thousand tons of ore, to be assorted upon said dumps by defendant on the following conditions, viz.: "1. For all ores delivered, ten dollars per ton in gold coin of the United States; 2. For all of said ores so delivered which have or show an assay value over or in excess of sixty dollars per ton, said second party shall pay to said first parties one half of, or fifty per cent. value of said excess over and above said sixty dollars value, in addition to the ten dollars per ton aforesaid. 3. For all lead ores which assay over thirty per cent. value per ton, said second party shall pay to said first parties twenty-five cents for each per centum of value in excess of said thirty per cent. of assay, and pay the same in gold coin of the United States."

The defendant on his part, agreed to purchase, receive and pay for said one thousand tons of ore as follows: "1. For each one hundred tons delivered, so soon as delivered, the sum of one thousand dollars, gold coin of the United States. 2. For any excess of value, as above set forth, over and above the said ten dollars per ton, said second party shall pay the same to said first parties on the first day of each and every month during and after this agreement."

The defendant also agreed to take "all fine or powdered ores now on the Crown Point No. 2 dumps, without further assorting, at ten dollars per ton gold coin," and bound himself "to take all ores which may be assorted by his men and placed upon said dumps." It was further agreed that "the assay value of all ores may be taken by both parties to this contract, and all differences in the same shall be settled and adjusted by dividing the same between the two in the ratio of said differences."

This action was brought to recover a balance claimed to be due upon the value of four hundred and seventy-nine and eight hundred and eighty-nine two thousandths tons of ore which it is alleged the defendant received and smelted in his furnace.

1. In order to decide some of the questions presented by this appeal, it is necessary to determine whether, under the written contract, the assays of the ore were to be averaged at the end of each month, or whether the assays were to be taken and the value of the ore ascertained in separate lots and quantities as delivered.

The language of the contract is not free from doubt, and to enable us to determine its meaning, we must look at the relative position of the parties at the time the contract was made, and consider the object they had in view. In other words, the contract must be interpreted by a consideration of all of its provisions with reference to the general subject to which they relate, and in the light of the contemporaneous facts and circumstances, so as to arrive at the intention of the parties at the time the contract was entered into. When so interpreted, it seems to us that it was the intention of the parties that assays of all the ore delivered under the contract for each month should be taken and averaged, and that the payments for excess of value over and above sixty dollars per ton should be paid on the first day of the succeeding month. This payment to be in addition to the payments of one thousand dollars for each and every one hundred tons at ten dollars per ton, as specified in the contract.

Any other construction would leave the results purely accidental. It is shown by the testimony that some of the ore from the Crown Point was very fine powdered ore, and it was sampled and assayed from the sacks when delivered at the furnace, while other portions of the ore were coarse and had to be put through a rock-breaker before being shoveled into the furnace, and the samples and assays of the coarse ores were generally taken after the ore was crushed by the rock-breaker. The powdered ore was richer than the coarse ore. One lot of ten tons of the fine powdered ore had an assay value of one thousand four hundred and forty-nine dollars and eighty cents in excess of the sixty dollars per ton, while one lot of seven tons of the coarse ore had an assay value of one hundred and sixty-one dollars in excess of the sixty dollars per ton. There is nothing in the contract to the effect that the fine powdered ore should be sampled and assayed separate from the coarse ore, or that

the samples and assays of the ores from the Crown Point should be kept separate and distinct from the ore from the Vulcan, or that settlements should be made for each and every ton of ore that assayed over sixty dollars per ton, independent and exclusive of the value of other ores that did not assay sixty dollars per ton. The ores seem to have been sampled and assayed in separate lots as taken from the wagons for convenience' sake only, and the ores from the Crown Point and Vulcan were kept in separate piles simply to enable the workmen to properly feed the furnace with the different qualities of ore. Several samples were taken and assays made from the ore of the respective mines prior to the signing of the contract. The ores in the Vulcan assayed from nine to ninety dollars per ton in silver, the general average being in the neighborhood of thirty dollars per ton, while the assays of the Crown Point ore averaged about one hundred dollars per ton.

The prevailing idea to be gathered from the language of the contract, as well as from the acts of the parties, seems to be that all the ores delivered would average about sixty dollars per ton. If the average was less it was the defendant's fault, as the privilege of employing assorters to assort the ores was left to him. If the ores averaged more than sixty dollars per ton, the plaintiffs were protected by the clause allowing them a certain percentage of the excess.

The conclusions reached by the court below in allowing the plaintiffs to recover the assay value of the separate lots of ore that assayed over sixty dollars per ton, without taking into account the general average of all the ore received during the month, is at variance with the views we have expressed, and necessitates a reversal of the judgment.

2. The third finding of the court, to the effect that E. K. Phipps was assayer for both parties, is not sustained by any evidence. He was weigher for both parties; but as assayer of the ores delivered under the contract, he acted solely for the plaintiffs.

3. All differences as to the assay value of the ore were settled and adjusted as provided for in the contract, or otherwise agreed upon by the respective assayers, except one lot of one hundred and fifteen tons. There is some testimony tending to show that the assays of this one hundred

and fifteen tons were not adjusted, for the reason that neither Cook, the assayer, nor defendant, nor any of his agents, would agree to any such settlement. If, upon a new trial, the weight of evidence sustains this view, it would be the duty of the court or jury to accept the assay of Phipps, if proven to be correct. Neither party ought to reap any benefit by a failure or refusal to comply with the terms of the contract.

4. If the court or jury should find as a matter of fact that plaintiffs were ready and willing at all times to deliver ores to the defendant in accordance with the terms of the contract, and that defendant failed to comply with its provisions, they would be entitled to recover the full contract price for all ores delivered. But if, on the other hand, as defendant contends, the weight of evidence shows that defendant was ready and willing to receive the full one thousand tons, and the plaintiffs, notwithstanding the capacity of the mines to enable them to comply with the terms of the contract, failed and refused to furnish or deliver the ore, they could only recover for each and every one hundred tons of ore indivisible, and would be liable to defendant for all damages, if any, he sustained by reason of their failure to comply with the contract.

5. The remaining questions which have been argued on this appeal, as to whether there was a verbal agreement changing the written contract so as to specify the proportion of ores to be delivered from the respective mines; or as to the percentage that should be allowed in making the assays, for the shrinkage or dryage of the ore; or in any other particulars, as claimed by defendant, can not be considered under the present state of the pleadings, as both parties rely solely upon the express terms of the written contract. If, however, the pleadings should be amended in this respect (and it would be the duty of the district court to allow such an amendment if properly asked for), then these questions should be determined in accordance with the evidence that may be offered upon a new trial; the burden of proof resting upon the party seeking to establish any verbal modification or change of the terms of the written contract.

The judgment of the district court is reversed and the cause remanded for a new trial.

BARBER v. CAZALIS ET AL.

(30 California, 93. Supreme Court, 1866.)

Order on demurrer construed. A complaint which stated two causes of action being filed, the defendant demurred to the whole complaint on the ground of defect of parties; and also to the first cause of action on the ground that the facts stated were insufficient to constitute a cause of action; the demurrer to the plaintiff's complaint was sustained and judgment entered for the defendant. *Held*, that the natural import of this record is that it was the demurrer to the whole complaint which was sustained, else the judgment would not have been for the defendant.

Parties. In an action for breach of contract, parties who have no interest in the suit are not proper parties, and a demurrer for their non-joinder was erroneously sustained.

Pleading. In this case the allegation of the contract, breach, and a claim for general damages is sufficient on demurrer.

Partnership. A contract by which a party agrees to superintend the driving of a tunnel, for an interest therein, does not constitute him a partner with his employers.

Appeal from the District Court of the City and County of San Francisco, Fourth Judicial District.

The defendants entered into a contract in writing with D. W. Williams and others, of date April 25, 1863, by which defendants were to excavate two tunnels, in consideration of all the ores found therein and an undivided half of certain quartz lodes.

The complaint contained a copy of this contract and averred that defendants employed plaintiff to superintend the work under said contract, and agreed with him in writing on said April 25, 1863, to furnish all necessary means to pay for the work and to pay to plaintiff one third of the undivided half of the lodes above mentioned and one third of all the ores from the tunnels in consideration of his services as such superintendent. Both contracts were acknowledged and recorded. The complaint also alleged that defendants had failed to furnish the necessary means, etc., by reason of which work had wholly ceased on the tunnels and defendants had forfeited their right to acquire a title to the said lodes and ore and were unable and refused to fulfill their agreement with plaintiff, to his damage in $10,000. This count also alleged that defendants

formed a corporation called the Eclipse Tunnel Co., and conveyed all the interest either of them might acquire in the lodes, etc., under their contract to the corporation and thereby put it out of their power to fulfill their contract with plaintiff to his damage in $10,000. There was a further allegation that plaintiff's services continued over a period of twenty-five months and were reasonably worth $400 per month, and that by reason of the premises defendants had become liable to the plaintiff for the value thereof.

Defendants' demurrer to the complaint was sustained, from which order plaintiff appealed.

CAMPBELL, FOX & CAMPBELL, for appellant.

EDWARD J. PRINGLE, for respondents.

By the Court, SAWYER, J.

The complaint contains two causes of action—the first for an alleged breach of contract between the plaintiff and defendants, by which the plaintiff was to give his services in superintending the construction of certain tunnels for mining purposes in Nevada, for which he was to receive a certain interest in the tunnels and in the mines to be developed; and the second, for moneys advanced and expended by plaintiff in constructing said tunnels for and on account of said defendants, and at their request. The defendants demurred to the whole complaint, on the ground of defect of parties in not joining either as plaintiffs or defendants certain other persons, who had entered into another contract relating to the same subject-matter, which latter contract was referred to in the sub-contract between plaintiff and defendants. Also, to the first cause of action stated in the complaint, on the ground that the facts stated are insufficient to constitute a cause of action. There was no demurrer to the second cause of action stated in the complaint. The demurrer to "plaintiff's complaint" was sustained, and leave to amend given. Afterward, "the demurrer of defendants to the plaintiff's complaint having been sustained, and the time allowed the plaintiff to amend having expired, and no amended complaint having been filed," judgment was entered for the defendants. The court

does not seem to have passed upon the demurrer to the first cause of action set out. It was the demurrer to the entire complaint that was sustained. Such is the natural import of the order and judgment, and it must be so, because the judgment after failure to amend is for the defendants; whereas, if the demurrer to the complaint as a whole was not sustained, there was one good count not demurred to, upon which, no answer having been filed, there must have been a judgment for plaintiff.

The only ground of demurrer to the entire complaint is as to defect of parties; and on this point the judgment is clearly erroneous. The plaintiff sued upon an alleged breach of his contract with defendants, to which the other parties named in the complaint are in no way parties. It may be that they also have a cause of action against defendants for breach of their contract with them, but that is no concern of the plaintiff's. The contract between defendants and Williams, Bass and others, is set out in the complaint, because it is referred to in the contract between plaintiff and defendants for the purpose of designating what plaintiff was to do, and what he was to receive for his services. The parties to the sub-contract, instead of using their own language to describe the work to be performed by plaintiff, and the property to be conveyed to him for his services, referred to the principal contract for that purpose, and to that extent incorporated it in their own. But the contract sued on is the contract of the parties to the suit alone. There is no question of mechanic's or other liens in it, and none of the other parties have any legal or equitable interest whatever in the matter in controversy. They are neither necessary nor proper parties to the suit brought. So of the Eclipse Tunnel Company. It has no interest whatever in the matter in dispute. The plaintiff alleges that defendants conveyed the property, which by their contract they were to convey to him, to said Eclipse Tunnel Company, for the purpose of showing that defendants had put it out of their power to perform their contract with him. But this state of facts does not place that company in such a position as to render it proper or necessary to make it a party to a suit growing out of a breach of the contract between plaintiff and de-

fendants. There was no defect of parties, and the demurrer to the complaint was improperly sustained.

Averment of damages in a complaint for breach of contract.

The sufficiency of the first cause of action has also been argued. The contract, the breach, and the refusal to make any recompense for plaintiff's services, to plaintiff's damage ten thousand dollars is alleged. The damages thus alleged are general damages, but it seems to us to be sufficient so far as the question arising on demurrer is concerned. The measure of damages is another question, which does not arise in this stage of the proceedings. The plaintiff, it is true, alleges in addition that he rendered his services for a specified time; that by reason of the premises defendants had become liable to pay to the plaintiff what said services were reasonably worth; that they were worth a specified sum; and that although often requested so to do, the defendants had neglected and refused to pay, etc. Conceding the plaintiff to have mistaken his measure of damages, and that these latter allegations are surplusage, still, a contract, a breach, and general damages are alleged, and this is sufficient on demurrer. It is not now clear to our minds, however, that plaintiff is not entitled to rescind. He had received nothing from defendants to be returned. He had derived no benefit whatever from what had been done by plaintiff. He got nothing. There was nothing for him to return. The defendants advanced some money, it is true, for the construction of the tunnel, but it went into their own tunnel so far as the contract between them and plaintiff was concerned. It was put just where they wanted it placed. They still had their property, not in the form of money to be sure, but in the form of a tunnel for developing a mine. They had all that they had themselves put in and the benefit of the plaintiff's services besides, while the plaintiff lost his services and got nothing from the defendants to restore. If defendants failed to get the tunnel, it was in consequence of the breach of their contract with other parties. Why were the defendants not in *statu quo* within the meaning of that phrase as used in this connection? But it is unnecessary to determine this question now.

There was no partnership between plaintiff and defendants created by the contract in question. There was no community of profit and loss. It was simply an agreement on one side to perform certain services, and on the other side to convey, in consideration of said services, a certain interest in a specific piece of property.

Judgment and order sustaining the demurrer reversed, and cause remanded for further proceedings.

SANDERSON, J., SHAFTER, J., and RHODES, J., concurring specially:

We concur in the judgment, but do not desire to intimate any opinion as to what is the measure of damages.

BEEKER ET AL. v. HASTINGS ET AL.

(15 Michigan, 47. Supreme Court, 1866.)

[1] **Stock sale—Caveat emptor—Infancy.** Complainants owning certain real estate in Detroit, of the value of $1,600, sold the same to defendant, and received in exchange certain copper stock and defendant's note. Before delivering the stock defendant directed complainants to make inquiries as to its value, and not to rely upon his, defendant's, representations or estimate. The stock proved worthless. The vendor of the realty, and the parties who received the stock, were an illiterate German woman only slightly acquainted with the English language, and her daughter, aged sixteen years. *Held*, that in such case, where parties stood upon equal terms as to their opportunity of obtaining information concerning the subject-matter of sale, each must rely upon his own judgment and means of knowledge; but the conveyance as to the daughter was set aside upon the ground of infancy, as of course.

Appeal in chancery from Wayne Circuit.

The bill in this cause was filed to set aside a conveyance on the ground of fraud and inadequacy of price. It was dismissed in the court below.

The facts are stated in the opinion.

J. P. WHITTEMORE, for complainants.

[1] *Weist* v. *Grant*, Ante 28; *Renton* v. *Maryott*, 21 N. J. Eq. 123; *Post* MORTGAGE; *Tuck* v. *Downing*, 76 Ill. 71; *Post* FRAUD.

CLEVELAND HUNT, for defendants.

CHRISTIANCY, J.

The decree of the court below, declaring the deed void as to complainant, Maria E. Braun, on the ground of her minority, not having been appealed from by her or the defendants, we are only to consider the case so far as it relates to the complainant, John J. Beeker. Complainants and their mother, since deceased, believing themselves to be the owners, and being in possession of a lot on the plat of a part of the Louis Moran farm, undertook through complainant, John J. Beeker, to sell the same. He employed an agent by the name of Gee, to make the sale, but having for some time been unable to find a purchaser, he at length introduced said John J. Beeker to defendant Hastings, as a person likely to purchase. Hastings went two or three times to see the property, and the price talked of to him was $2,000, which from the evidence we think was its full value with a good title. Before anything was concluded, Hastings got defendant Shepard to join him in the proposed purchase, and Shepard having examined the record, found complainants had no title; the deed from one Damm to the father of complainants, through which they claimed, having apparently, by some mistake entirely unexplained, described lot four instead of lot five, he or his grantor having owned the latter, but not the former. The mistake is in no way explained, nor do the circumstances appear upon which to form any opinion, whether the mistake was one of which a correction could be compelled. The father had purchased in 1850, lived upon it until his death in 1854; and complainants had continued to live thereon until 1856, when the sale to defendants was made; and it does not appear that any person had claimed title against the complainants or their father; but this is all that appears in reference to the title.

Complainants and their mother had never known or suspected any defect of title until informed of it by defendant, and were very naturally somewhat alarmed, and as it seems became all the more anxious to sell; but defendants, after this discovery would not of course make the purchase and pay the value of the property for so uncertain a title; but (through

Hastings) they offered certain copper stocks and their note or agreement to pay three hundred dollars, payable when a good title should be perfected. The result was that the complainants consented to and did receive the copper stock and this note or agreement, and executed to the defendants a deed of the property.

The bill claims the sale to be void on the ground of the fraud and imposition of Hastings, by which, as they allege, they were induced to take the stocks. But in this we are not satisfied that the bill is sustained by the evidence. The stock, it is true, turned out to be utterly worthless. But whether the title conveyed to defendants was of much greater value, is left quite problematical upon the evidence. The complainant, John J. Beeker, who did the business for himself and mother and sister, was doubtless deceived as to the value of the stocks, and probably acted imprudently in making the trade; but though a young and inexperienced German who understood and spoke the English language imperfectly and entirely ignorant of copper stocks and their value, he does not seem to have been particularly deficient in natural capacity. He was doubtless easily imposed upon, and it may be that defendant Hastings neglected the performance of a duty which strict morality may have imposed, when he failed to explain to him all he knew about the uncertain value, or want of value of the stock. Strict morality might have required him even to caution the complainant against parting with anything he considered valuable in exchange for such stock, and we may feel that he has made a bargain which a purely conscientious man ought not to insist upon; yet he stood in no confidential relation to complainants or any of them, they stood upon equal terms, except that one was more intelligent than the other; the one was seeking to sell, and the other to purchase, and each should have relied upon his own judgment or taken such advice as he deemed proper; and there was no sufficient reason why complainants should rely upon the opinions or representations of the other, either as to the value of the title conveyed by the deed on the one side, or that of the copper stock given for it upon the other. Hastings may have recommended the stock to be of greater value than he really believed it to be; yet he did not ask complain-

ant to take it upon his estimation of its value. He handed to him these stocks (with several others which were in fact of some value) to go and make inquiries of its value for himself. Complainant, it seems, only inquired of his own agent, Gee, who, he says, merely told him that he could rely upon Hastings, and that Hastings would not cheat him.

It does not appear that this was communicated to Hastings, nor is there any evidence showing combination or concert between him and Gee. It was complainant's own folly to take the stock without further inquiry. He had fair notice that he was to ascertain the value of the stock for himself. And though we may feel that defendants have made a bargain which a conscientious man ought not to insist upon holding, we can discover no ground on which we can set the sale aside for fraud in procuring the complainants to take the stock, without laying down a principle which might disturb many titles, and which would be likely to do more injury in other cases than we should remedy in this.

But there is another branch of the case of which we have been compelled to take a different view. The deed executed by complainants and their mother on the sale was a warranty deed containing covenants of seizin in fee, against incumbrances, and warranty, and it purports to have been made for the consideration of $2,000, yet the answers of the defendants and their own testimony leave no room to doubt that by the understanding and agreement between them and the complainants, the defendants were to take the property at their own risk, with the single exception that the amount they might pay to remove the small mortgage of about $80 and the expenses of perfecting the title were to be deducted from the $300 for which their note or agreement was given. It is entirely clear that this was the understanding of the parties to the transaction, and no satisfactory reason is given, nor do we see how any could be given consistent with the testimony of the defendants themselves for the execution of the deeds with the covenants mentioned. It is evident the complainants did not understand the deed to contain these covenants, or that they were any of them to be accountable for any defect of title. They understood the English language very imperfectly and complainant, J. J. Beeker, upon whom the others seem to have

relied, was unable to read writing; they were ignorant of the modes of doing business of this kind. Hastings was an intelligent business man. They did not read the deed, nor does it appear to have been read or explained to them; it was prepared by Hastings himself, and they doubtless executed it in full reliance upon his fidelity and in the belief that he had drawn it in accordance with the understanding. Whether Hastings intended it, or whether it was the result of his mere carelessness (which we are inclined to believe), the effect was a fraud upon the complainants. And if the bill had been properly drawn, making this a specific ground of complaint, the complainant, John J. Beeker, might, we think, upon the evidence have been entitled to a decree for the release of the covenants of seizin and warranty. But the bill is silent as to this fraud or mistake; it is not, therefore, properly in issue, and we can not, therefore, grant him this particular relief in this case. The decree of the court below dismissing the bill must be affirmed, with costs, without prejudice to complainants' right to bring a bill for the correction or reformation of the deed, and for a release of the covenants.

The other Justices concurred.

CHENEY v. BARBER.

(1 Colorado, 73. Supreme Court, 1867.)

[1] **Evidence—Contract must be proved as laid.** Where money was to be paid upon the sale of certain mining property, the plaintiff must show that the property has been sold, before he can recover.

Appeal from the District Court of Gilpin County, First Judicial District.

The action was *assumpsit* upon the following instrument: "$600.

Four months after date, for value received, we jointly and severally promise to pay J. E. Barber, or order, $600.

WILLIAM S. ROCKWELL,
October 3d, 1863. HAZEN CHENEY, Su'ty."

[1] *Worden* v. *Dodge*, Ante 116; *Peddie* v. *Donnelly*, Ante 157; Ante 186; Notes 1 and 2.

"In consideration of the above sum, being without interest, we promise and agree that should William S. Rockwell, one of the signers hereto, effect a sale, at the East or elsewhere, of certain mining property on the Bobtail lode, and receive his pay therefor, that we will pay an additional $600.

WILLIAM S. ROCKWELL,
October 3d, 1863. HAZEN CHENEY, Su'ty."

In the first count of the declaration, it was alleged that the property referred to in the second part of the agreement was sixty-six and two thirds feet off the east end of claim No. 1, and twenty feet off the west end of claim No. 2, east of Discovery claim on the Bobtail lode, and that Rockwell had made sale of the property and received pay therefor.

In the second count it was alleged that the property referred to in the second part of the agreement was sixty-six and two thirds feet off the east end of claim No. 1, east of Discovery claim on said Bobtail lode, and that Rockwell had sold it and received pay therefor. There was judgment for the plaintiff below against Cheney, who alone had been served with process.

W. S. & L. C. ROCKWELL, for appellant.

JOHNSON & TELLER, for appellee.

HALLETT, C. J.

The appellee declared for two sums of $600 each, one of which was payable if Rockwell should sell certain premises on the Bobtail lode, which are described in the declaration. There is no evidence that these premises were sold. One witness swears that Rockwell had property on the Bobtail lode to sell for several parties, and another testifies to an admission by appellant that some property on the Bobtail lode had been sold, but it does not appear that the premises described in the declaration were sold. The contract should have been proved as laid. The judgment of the district court is reversed, with costs, and the cause remanded for a new trial.

Reversed.

GREEN ET AL. v. GILBERT.

(21 Wisconsin, 395. Supreme Court, 1867.)

Tube-well drilling—A service of personal skill. In *quantum meruit* upon parol contract to drill a well, the question as to whether such contract was an undertaking requiring personal supervision was held properly left to the jury; and the jury having found in the affirmative, the sickness of the plaintiff was allowed as an excuse for discontinuing before the depth called for was reached.

Appeal from the Circuit Court of Columbia County.

On the 1st of April, 1862, the plaintiffs, Green and Sheldon, who were copartners in the business of drilling wells, were employed by Gilbert to drill a well for him, at a place by him designated on his land. Green furnished the drilling machine, and sometimes assisted Sheldon, who during that year did most of the work. About the middle of July or first of August, when they had drilled 93 feet, they suspended work for a time; and about the last of October Sheldon enlisted, and never returned to the work. About the middle of December, Green proposed to resume work upon the well, but Gilbert objected, asserting that they had violated their contract, and that he was no longer bound. Some arrangement was however made, and Green drilled seventeen feet further, and again suspended work. In the spring, 1863, Green again proposed to resume the drilling, but Gilbert forbade him to do so. This action was brought to recover for the work so done, at the rate of $1.50 per foot. The complaint alleges that the contract between the parties, April 1, 1862, was for payment at that rate for whatever distance plaintiffs might drill, they agreeing to "drill for defendant until he should deem it best to stop." It also avers, as the reason for suspending the work the second time, that Green "was taken sick and compelled to relinquish" its farther prosecution at that time. The answer avers that the contract on plaintiffs' part was, to construct the well "as soon as by due diligence and energetic exertion" on their part, it could be constructed, so as to furnish constantly a certain amount of water; that plaintiffs should immediately commence the work, and continue it until the well

was thus completed; and if they failed so to complete it, they were to receive no pay. It then alleges that plaintiffs abandoned the work about the middle of July, 1862, and shortly afterward dissolved partnership, and Sheldon left the State, and has not since returned, to defendant's knowledge; that in December, 1862, Green and defendant entered into a new contract, viz.: that if Green should pay defendant $25 damages for board, use of defendant's team, etc., the previous summer, and should go immediately to work and complete the well as previously agreed, then, upon its completion, defendant would pay him at the rate of $1.50 per foot; but in case of a failure to complete the work Green was to receive no pay. The answer also sets up a counter-claim for damages for plaintiffs' non-performance of their contract. Reply in denial.

The evidence, which was voluminous, will not be stated. The following instructions asked by the defendant were either refused or modified by the court as hereinafter stated: 1. "If plaintiffs were partners, and the partnership was dissolved before the work was completed, and a new contract for the completion of the well made with one of them, upon a valuable consideration, they can not recover in this action." Qualified by adding, "unless the other plaintiff, by an arrangement between the plaintiffs, had, at the commencement of this action, an interest in the recovery." 2. "If the contract between the parties was entire, to dig the well, and payment was not to be made until it was completed, plaintiffs can not recover unless they have performed their contract." Qualified by adding, "Or are excused according to other instructions which I shall give you." 3. "The sickness of one of the parties will not excuse the performance of this contract." Refused. 4. "If plaintiffs did not prosecute the work with due diligence and use the best possible exertions to perform the contract, they can not recover unless they have completed their contract." Refused. 5. "Plaintiffs were bound to perform their contract within a reasonable time, and unless defendant by his acts delayed them and prevented them from performing it, they can not recover." Qualified by adding, "This is upon the supposition that no time was fixed by the terms of the agreement, and that plaintiffs were not excused by sickness."

The court gave the jury the following instructions, requested by the plaintiffs: "1. If plaintiffs were to secure water or receive no pay, this will not prevent a recovery, if the work was stopped by defendant before a breach by plaintiffs. 2. The jury are at liberty to find from the evidence that defendant, in consenting to a resumption of the work in December, 1862, waived all delinquencies of plaintiffs up to that time. 3. If defendant, with full knowledge of Sheldon's absence, consented for a good consideration to have the work resumed under the sole charge of Green, and if the service contemplated peculiar skill and personal service on the part of Green, then sickness on his part, which disabled him from proceeding with the work, is a legal excuse for delay; and if defendant refused to let plaintiffs go on according to the contract, plaintiffs can recover, if they had a joint interest at the commencement of the action." The court further instructed the jury as follows: 1. "One theory of the plaintiffs is, that the original contract continued throughout, and that the transaction in December, between Green and defendant is to be considered as a modification of the contract as to terms only. The other theory is, if you do not find that this was such a modification of the first contract, but was a new contract exacted by the defendant after refusal to have the work proceed under the first contract, that then the parties are entitled to recover for work done prior to this time, and also for work done subsequently, if they show a legal excuse for finally abandoning the work. 2. If you find a new contract was made in December, was the time of its performance fixed? If so, have the plaintiffs been delayed by sickness, and finally prevented from completing it by the refusal of the defendant to let them go on according to the contract? 3. The defendant's theory, based on the original agreement, is, that it had ceased in December, and there was a new one then made which the plaintiffs also failed to perform; or, that if plaintiffs are to be regarded as having gone on, in December, under the old contract, then that they have failed since. 4. The plaintiffs must have had a joint interest in the subject of the action (that is, in the recovery) at the time of its commencement, in order to maintain this action. 5. If either party had, in some particulars, failed during the progress of the

work in 1862, did the other party assent to the failing party going on under the contract afterward, consenting to waive the default? If so, the party so consenting can not now go back and claim that such failure was a violation of the contract. For instance, the plaintiffs being gone, or the defendant failing to furnish money, if you should find that, by the terms of the original contract, he was to furnish it. 6. Sickness, such as to prevent the party from performing the contract, is an excuse for the non-performance; but you must find, as a matter of fact, that this was work requiring skill; that the original contract, as charged, or the new contract, contemplated the personal services of Green, and that the drilling is of some benefit to Gilbert, not speculative—that the well itself, as it now stands, is of some value as a permanent improvement. In this view of the case, plaintiffs could recover only the value of the improvement."

Verdict for plaintiffs for $139.50; motion for a new trial denied; and the defendant appealed from a judgment on the verdict.

G. C. PRENTISS and EMMONS TAYLOR, for appellant.

HAZLETON & DERING, for respondents.

DOWNER, J.

Errors are assigned in granting and refusing instructions to the jury. If the contract between the parties was, that the plaintiffs should sink the well till they got water or have no pay, and if it was so understood when, in December, 1862, after Sheldon had gone to the war, the defendant consented that Green should go on and complete the job, then it is obvious the plaintiff ought not to have recovered, unless the jury found that the contract was for the personal services of Green in drilling the well, and he was by sickness prevented from performing the work from the time he stopped, about the first of January, 1863, until he offered to go on and complete the job, when the defendant refused to permit him to do it. Sickness is sufficient to excuse delay, or even non-performance of contracts for personal services, and is regarded as the act of God. See *Wolfe* v. *Howes*, 20 N. Y. 197, and authorities

there cited. But in such cases the recovery is not for the contract price, but on a *quantum meruit*. It was urged by the appellant's counsel, that the drilling of the well was not a contract requiring skill, and that the plaintiffs might have procured another person to do the work. We think, as there was some conflict in the evidence as to the terms of the contract, which was verbal, it was proper to leave it to the jury to find whether the drilling required peculiar skill, and whether it was the intention of the defendant in December, 1862, to waive past delinquencies and the personal services of Sheldon; also whether it was then the agreement of the parties that Green should give his personal services in the completion of the job. The instructions asked by the defendant, and refused, are not in harmony with these views, and were therefore rightly refused.

We have more difficulty with the instructions given. Some of them are somewhat obscure. Yet we think they may reasonably be so construed as to be in harmony with correct principles of law. To reverse the judgment, we must be satisfied that the circuit court erred to the prejudice of the appellant. It is not clear to us that there was such error, and we therefore affirm the judgment.

BY THE COURT.—Judgment affirmed.

GROVE v. HODGES.

(55 Pa. St. 504. Supreme Court, 1867.)

Deed under seal, by attorney without power under seal. A license of the privilege to exsect iron ore at a certain rate per ton, containing covenants signed, "Michael Garner [SEAL], William Irwin [SEAL], by agent, Miles McHugh." *Held*, that McHugh, not being attorney in fact created by instrument under seal, and Irwin never having confirmed the instrument by deed, that it was not his deed. But that having accepted the benefit of it, he was liable as upon a parol contract.

An unperformed promise, not a false representation. A man can not be relieved from his deed by showing that at the time of its execution promises were held out to him which have not since been performed.

Fraud, it is true, avoids all contracts, but a promise is not in itself a false and deceitful representation, because performance may have been intended.

Want of mutuality is no defense except in cases of *executory* contracts.

Error to the Common Pleas of Huntingdon County.

This was an action of trespass *q. c. f.* brought by Michael J. Grove against Edward F. Hodges.

Michael Garner was the owner of the *locus in quo* on the 16th of June, 1855. On that day an instrument of writing was executed as follows:

"Article of agreement made this 16th day of June, A. D. 1855, between Michael Garner, of Penn township, Huntingdon county, Pennsylvania, and William H. Irwin, of Lewiston, Pennsylvania, as follows: The said Michael Garner hereby sells to said Irwin for the consideration of twenty-five cents per ton, the right to mine, take and carry away the iron ore on and in the land owned by said Michael Garner, situated in Penn township, Huntingdon county, Pennsylvania, bounded by land of Philip Garner on the north, Samuel Hetrick on the south, Philip Garner on the east, mountain lands on the west, containing about forty acres, and Irwin agrees to pay said Michael Garner the sum of twenty-five cents for each ton of iron ore mined on the lands of the said Michael Garner, and agrees to pay said M. Garner the sum of thirty dollars for each acre of the land of said Michael Garner which Irwin may destroy or dig up by his mining operations, and Irwin stipulates to commit no wanton waste or damage to the land of the said Michael Garner. This agreement to extend to the heirs and assigns of the parties. Witness the hands and seals of the parties.

MICHAEL GARNER, [L. S.]

Witness: WILLIAM IRWIN, [L. S.]

JACOB F. HOOVER. By agent MILES MCHUGH."

This instrument was acknowledged before a justice of the peace on June 21st, and recorded in Huntingdon county, July 17, 1855.

At the January term, 1856, a judgment was recovered against Irwin for $501.40, and a *fi. fa.* was issued on it.

The sheriff returned: "Also by direction of plaintiff's attorney, I levy on all the following mentioned rights and interests of said defendant, evidenced by the agreements and

conveyances recorded in Huntingdon county, etc., * * to wit: 'All defendant's interest and right to mine, take and and carry away the iron ore on lands of Michael Garner, in Penn township, Huntingdon county, containing about 40 acres, bounded by lands of Philip Garner, Samuel Hetrick and Tussey Mountain lands.'"

To the *venditioni* afterward issued, the sheriff returned that he had sold: "All the defendant's right, title and interest to mine and take away the iron ore on the following property, to wit: the iron ore on land of Michael Garner, in Penn township, to Jacob Cresswell, for $35." The deed to Cresswell was acknowledged August 19, 1857.

On the 1st of December, 1863, Garner, in consideration of $1, granted to Michael J. Grove, his heirs, etc., all the iron ores in, upon and under a certain tract in Penn township, etc., containing 48 acres more or less, adjoining land of Philip Garner, etc., with the exclusive right of mining and carrying away said iron ores, and also the privilege of ingress and egress, and of convenient and sufficient room on the premises to mine and pile said iron ores, together with the rubbish and material necessary in such mining, and also numerous other privileges of drainage, erecting machinery, etc., etc., as fully as if the said Michael J. Grove were the actual owner of said premises. In consideration whereof the said Grove, his heirs, etc., agreed at the expiration of every three months whenever the said iron ores were mined on said premises, to render a true account to said Garner, his heirs, etc., of all ores removed therefrom and to pay the sum of 25 cents for each ton, etc.

This deed was recorded December 8, 1863.

Grove shortly after commenced to dig for ore on the premises and continued to mine the same.

On March 30, 1864, Cresswell, the purchaser at sheriff's sale of the right of Irwin, sold and conveyed to Edward F. Hodges; the deed was recorded in Huntingdon county on the next day. Shortly after this Hodges commenced mining near to where Grove was mining, and in the same vein, and hauled the ore away.

This was the trespass for which the suit was brought, and the question turned upon the effect of the "article" of Garner to Irwin. On the trial before TAYLOR, P. J., the record of the agreement to Irwin was offered by the defendant, but

objected to by the plaintiff, unless accompanied by proof of authority in McHugh to execute the article. The objection was overruled, and an exception taken.

The defendant having given the evidence showing Irwin's title to be in Hodges, offered the deposition of McHugh, regularly taken in Illinois, on commission, to prove that McHugh was acting as agent for Irwin in making the agreement with Garner.

This was objected to by the plaintiff as not tending to prove authority in McHugh to "execute the agreement to Irwin and seal the same for him." The objection was overruled, and an exception taken.

In answer to one of the interrogatories, the witness said:

"I have not the power of attorney, and do not know where it is. It was given me in April, 1855, and I was to take charge of his business May 9, 1855. I was to open some coal drifts, and to act as his agent in mining and shipping of coal. I can not say that this writing stipulated that I was to act as his agent in procuring ore leases specially, but I understood from it that I was to attend to his business generally and as his general agent. This paper was written by Mr. Irwin, and was under his hand and seal. I can not say that this paper gave me the authority to execute agreements for mining grants under seal; I do not recollect whether it did or not. I have made diligent search for this paper, but can not find it."

Irwin testified for plaintiff that he thought he had not given to McHugh a power of attorney or any written authority (unless it were a letter), to make an ore lease with Garner or to sign his (Irwin's) name.

There was evidence for the plaintiff by Garner, that when McHugh came to him about the agreement with Irwin, he said that it would be an inducement to build a furnace or two; that McHugh said a furnace would be built in a year, or at most within two years. The points designated for the furnaces were Marklesburg and McConnellstown; that with this understanding Garner leased to Irwin.

There was no furnace put up and Irwin never took any ore out. Money had been received by Garner from Hodges for taking out ore.

The plaintiff offered to prove that the Garner vein of ore, with others in the vicinity, had greatly increased in value by building the Broad Top Railroad since the date of Irwin's agreement; the evidence was rejected and an exception taken.

The plaintiff asked the court to charge:

1. That there was no evidence in this cause of any authority in Miles McHugh sufficient in law to enable him to execute for William H. Irwin the sealed agreement with Michael Garner dated the 16th of June, 1855, and therefore the said agreement was not binding upon either Michael Garner or William H. Irwin, and the said William H. Irwin did not acquire thereby any right to mine ore on the tract of land mentioned in the said agreement, or any interest in the same.

2. That there is no evidence in this cause of any act or thing done by Michael Garner, William H. Irwin or Jacob Cresswell, prior to the date of the deed from Michael Garner to Michael J. Grove, which made the said agreement of 1855 binding upon Michael Garner in law or equity.

3. That the said agreement was void at law for want of authority under seal in Miles McHugh, to bind Irwin by an instrument under seal, and could only acquire validity in equity by ratification or adoption by both Irwin and Garner, but that a chancellor would never afford his aid in giving it vitality after such laches and change of circumstances as characterize this case.

4. That under the evidence in this cause, Michael Garner had on the 1st day of December, 1863, a perfect right in law and equity to convey to Michael J. Grove, in fee simple, clear of all interest, rights or claims, by or under the agreement of 1855, all the iron ore in, upon or under the tract of land mentioned in the said agreement, and that his deed of that date, given in evidence, conveyed all the iron ore to the said Michael J. Grove, in fee simple, clear of any right to mine or take away any of the said iron ore in William H. Irwin, or any person claiming under him.

The points were all denied.

The court after stating the plaintiff's and defendant's titles, further charged:

"It is answered on the part of the plaintiff that the agree-

ment with Irwin is not valid and operative, so as to give the defendant any rights: 1, because defectively executed; 2, for the reason that it is merely an executory contract, and has remained unacted upon for such a period that it should not be regarded as valid or conferring any right; 3, that the Act of Assembly of 1856 applies to it, and that under the operation of that act it is void and inoperative.

"The only construction we can put upon the agreement with Irwin, in view of what is ruled in the *Cambria Iron Company case*[1] is, that it was not a grant of the whole of the ore, but only a right to mine; not an exclusive, but a concurrent right. Irwin had a right to go and mine; but Garner, and, after his agreement with Grove, Grove had also a right to go and mine. This is the construction warranted by the case cited. How, then, would the parties stand? It would follow that while Garner in 1863 conveyed by deed fully sufficient for that purpose, all the ore, provided he then had it to convey, his grantee took it subject to the operation of the instrument on record, that is, a grant or license to Hodges to mine concurrently with him. This, assuming the contract with Irwin to be valid and operative. Let us inquire whether its effect and operation are destroyed for any of the reasons urged by the plaintiff.

1. It is alleged to be defectively executed, and, for that reason, void. It is said that Irwin was not present; that McHugh had no authority under seal; no power or authority from Irwin to execute an agreement under seal; and that it is not, therefore, Irwin's deed, or binding upon him. Does this invalidate the instrument as the deed of Garner, or a grant or license to Irwin to mine ore at a stipulated price per ton?

[It is true, and a well-understood rule of the law of agency, that where the agent has no power under seal, and undertakes to sign the name of his principal, and to add a seal, it is not the deed of his principal; and this instrument, it must be admitted, is not the deed of Irwin, but, with respect to him defectively executed. But still, it is claimed by the defendant to be a grant by Garner, signed and sealed by him, and his deed; and that, since the only covenant on the part of the grantee is to pay twenty-five cents per ton for the ore mined,

[1] *Johnstown Co.* v. *Cambria Co.*, 32 Pa. St. 241, *Post* LICENSE.

if Irwin accepted it, and he or any one claiming under him acted upon it, he would be liable in assumpsit for the ore mined according to its terms, and that the objection that it lacks mutuality is without force. We are of opinion that the view here urged by the defense is correct, and so instruct you; that this instrument is to be treated as the deed or grant of Garner to Irwin if the latter accepted it, and treated and acted upon it as such.]

2. "[It is objected further, that it is a mere executory contract, and that a chancellor would not give effect to it, so as to enable these parties to take and enjoy rights under it.

"[We can not regard it as an executory contract. It grants or conveys everything in contemplation of the parties as intended to be granted or conveyed. There is nothing to indicate that the contract was to be put in any other form. We think, therefore, that the cases cited on the subject of specific performance do not apply. No decree is necessary to make it a grant; it is so by its terms.]

"3. [The other objection is, that this agreement, assumed to be executory in its character, comes within the statutory limitation. Assumed to be such, it would come within the terms of the Act of Assembly, but it is a grant or license and not, in our opinion, within its operation.]

"[Evidence was offered by the plaintiff to show that McHugh said, when the agreement was executed, or when negotiation was going on, that Irwin intended to put up a furnace in one or two years; and that Marklesburg or McConnellstown was designated as the point; and it is claimed further that, because that was not done, this instrument is inoperative and invalid. We have been unable to come to the conclusion that this evidence is entitled to any force either in construing the instrument, or as evidence of fraud to be submitted to the jury.] There is no allegation of any misrepresentation as to any matter of fact. If there were any promises made which might be claimed to be conditions of the grant, we should find them in the instrument itself. Evidence of this character can not be allowed the effect of changing it, or varying its terms.

"[Upon the whole we are of opinion that this paper for anything urged to the contrary, is a valid license to Irwin and

Hodges, claiming under him, to enter and mine iron ore, if it was accepted and has been held and acted upon as such. We admit that there are cases which look toward limiting the operation of such grants, where for any considerable time, nothing has been done in pursuance of them; but none which we think warrant us in declaring this instrument void upon that ground.]"

"[We instruct you, then, that if you find that Irwin received and accepted and acted upon this instrument, claimed under and ratified it, the defense should prevail and your verdict be for the defendant.] If on the other hand, the evidence is not sufficient to satisfy you that Irwin did accept of and ratify it, the plaintiff would be entitled to recover, and it would be for you to assess the damages."

The verdict was for the defendant, and the plaintiff took a writ of error.

He assigned for error the ruling of the court on the evidence; the answers to his points and the portions of the charge in brackets.

J. W. COMLY and J. G. MILES, for plaintiff in error.

JOHN SCOTT (R. B. PETRIKEN, with him), for defendant in error.

By the Court, STRONG, J.

Of the deed from Garner to Grove, it is needless to say more than that it was a conveyance of a corporeal hereditament, and that it passed in fee simple, the entire ownership of the iron ore in the land described, if such an estate was in the grantor when the deed was made.

This is not to be doubted with *Caldwell* v. *Fulton*[1] before us. But Garner had made a grant to Irwin before his deed to Grove, not indeed, as we think, a grant of a corporeal interest, but a grant of a right to take ore from the land. This grant was recorded before the conveyance to Grove, and the defendant claims under it. If it is to be treated as a valid and subsisting grant, it justifies the act of the defendant of which the plaintiff complains. But the plaintiff assails its validity on several grounds. The first is, that it was void at

[1] 31 Pa. St. 475; *Post* CONVEYANCE.

law, as an act of Irwin, because it was not signed and sealed by him, or by his agent duly authorized, and being void as to him it was void also as an act of Garner, for want of mutuality. The instrument, upon its face, declares that Garner thereby sells to Irwin the right described, to wit: the right to mine and take ore from the land for the consideration of twenty-five cents per ton, agreed to be paid by Irwin, and it is signed and sealed by Garner. It is also signed and sealed "William Irwin (L. S.) by agent, Miles McHugh." No sealed authority is shown, however, for McHugh's action, nor is Irwin shown to have adopted the seal which was affixed, or to have ratified the sealing by any sealed instrument, though there is evidence that he accepted the contract as made. It must be taken therefore that the deed is not a deed of Irwin. None of the covenants which it contains are his covenants. Yet it does not necessarily follow from this that the contract between the parties to it was not mutual. If Irwin accepted the grant, he accepted it with its expressed conditions and the contract became binding upon him to precisely the same extent as it would have been binding if he had personally signed and sealed the instrument. The mode of enforcing his obligations is different, but the duty is the same. It is assuredly plain law that if a party, who has not put his name to a written contract, accepts it when signed by the other party, it binds him the same as if he had signed it. Even mutual executory agreements are held binding upon both parties, though one may have signed and sealed, and the other signed but not sealed, though the agreements contain the words "witness the hands and seals of the parties," thus manifesting an intention that both should seal. The legal principle that contracts must be mutual, that they must bind both parties or neither, does not then mean that in every case each party must have the same remedy for breach by the other. Covenant may lie against one when only assumpsit can be maintained against the other. Nor does the principle mean that when the contract is written each party must sign it. The engagement of one may be in writing and that of the other rest in parol, even when the contract is wholly executory. It is true that when a contract consists of mutual promises, both parties must be bound or neither is; but in no case when the consideration is

a covenant or a promise, is the form of the undertaking material. It is its substance. If, then, there were no other considerations, it would be impossible to hold that Garner was not bound by his grant to Irwin because the contract was not mutual. McHugh was authorized to procure leases for Irwin, though not authorized to seal them. He procured this from Garner, and Irwin accepted it, had it put upon record, by his direction or with his sanction, and thus he became liable to perform all that the instrument stipulated he should. Under these circumstances it can not be said there was no mutuality in the contract.

But there is another view of the case which relieves it from all difficulty on this point. Want of mutuality is no defense to either party, excepting cases of executory contracts. It has no applicability to an executed bargain. There are many where the obligation is all upon one party. As to one, the obligation was fulfilled, the contract was executed when it was made. As to the other party it remains executory. A consideration may be either something done, or something to be done, or a promise itself. When it is something already done it is idle to talk of want of mutuality. That is to be considered only when the obligations of both parties are future. Such was the case of *Bellas* v. *Hays*, 5 S. & R. 427, so much pressed upon our attention in the argument. The agreement was wholly executory upon both sides.

Mutuality of obligation is considered perhaps more frequently in courts of equity than in those of law. In bills to enforce the specific performance of contracts which of course have to do with executory agreements, it is a constant inquiry what equities the defendant has against the complainant, and the chancellor will not enforce specifically a contract that is one-sided. But he will interfere at the suit of a complainant who discharged his part of the contract before the undertaking of the defendant was made or contemporaneously therewith. Unquestionably, if a deed be made to a married woman, or to an infant and a note be taken for the purchase money the deed is not void though the note be irrecoverable. It will be no answer to a demand for the subject of the deed to say that the contract was not mutually obligatory. That would do if the contract was executory upon both sides, for

then equity might interfere. But neither courts of law nor of equity interfere with executed contracts. They may be undone for fraud but not for want of mutuality. Much less are they annulled because the consideration may prove to be not formally what was expected, though substantially the same.

It needs but a reading of the instrument to show that the contract between Garner and Irwin was an executed one, on the part of Garner. It is an immediate conveyance of the right to mine, take and carry away the iron ore on and in the land of Garner for a consideration mentioned. It is not an agreement for a future conveyance. Garner sells in words *de præsenti*. He has nothing more to do. He undertakes nothing more. He signs and seals the instrument as evidence of what he had done, not of what he had to do. In the strictest sense, therefore, the contract was executed as to him, and the subject of the grant passed out of him the instant he signed the deed, and it was accepted by Irwin. The grant was not, then, void for want of mutuality in the contract.

It is next objected that the agreement being void at law, it could only acquire validity in equity, through subsequent ratification by both Garner and Irwin, and that a chancellor would not enforce it under the circumstances of the case. We are not prepared to admit that an instrument executed in the name of one of the contracting parties, but without any authority in the agent who executed it, is good only in equity, if it be duly and formally ratified by the party, whose name was put to it without authority. But it is unnecessary to discuss this question, for we have shown that Garner's grant was not void at law, if it was accepted by Irwin, and that it was accepted the verdict establishes. The rights of the parties are rights at law and not within the cognizance of a court of equity. If Irwin had ratified the contract by a sealed instrument it would have become his deed, and he would have been answerable for a breach of its covenants in an action of covenant. If he did ratify it by parol, if he accepted it, claiming rights under it, though it is not his deed, it is his contract and he is answerable for failure to comply with its obligations in an action on the case. Neither he nor Garner has any need of the aid of a chancellor.

Again it is objected that if the agreement was not void, it was executory, and such as a court of equity would not en-

force under the circumstances of this case, or that if it was an executed contract, it was a deed of bargain and sale, and void for want of a pecuniary or valuable consideration expressed. We have already said that in our opinion, the contract was an executed one so far as to convey the right to mine and take away iron ore. And if executed it is of no importance whether it is to be regarded a deed of bargain and sale or not. The consideration of such a deed must truly be a valuable one, but it need not be expressed in the instrument, if a consideration be averred: *Fisher* v. *Smith*, Mood. 569; *Jackson* v. *Alexander*, 3 Johns. 484. It has even been held that when no consideration is expressed, parol evidence may be given to show that one passed from the grantee to the grantor: *White* v. *Weeks*, 1 Pa. R. 486. However this may be it was resolved in *Wykes* v. *Tillard*, Cro. Eliz. 595, after the Statute of Uses, that the reservation of a rent on a bargain and sale would be considered a sufficient consideration to raise a use to the bargainee. Apply now these principles to the present case. The grant from Garner to Irwin expresses a valuable consideration. It is twenty-five cents per ton of ore mined, to be paid by the grantee. The obligation assumed to pay this is the consideration. *Jackson* v. *Florence*, 16 Johns. 47, cited on behalf of the plaintiff, was a case of bargain and sale on condition that the grantee should support the grantor. Even in that case it was intimated that the deed would have been good had there been any agreement, outside of the deed, that the bargainee should furnish the support. But in this State, where the acceptance of a grant, subject to burdens implies a promise to discharge the duties described, it can not be said that such a deed delivered and accepted is without a valuable consideration. We say so much on the assumption that the grant from Garner to Irwin is a bargain and sale. If it may be treated as a lease, the law raises a consideration out of the tenure itself.

Another objection urged against the validity of Garner's grant is that it is barred by the limitation of the sixth section of the Act of April 22, 1856. But that section applies exclusively to cases of a character entirely different from the present. It declares that "no right of entry shall accrue or action be maintained for a specific performance of any contract for

the sale of any real estate * * * or to enforce any equity of redemption after re-entry made for any condition broken, or to enforce any implied or resulting trust as to realty, but within five years," etc. If Garner's deed is a grant executed, as we think, and not a mere agreement to make a grant, it is not within the operation of this act.

It is further contended that the court below erred in that part of the charge in which the following language was used: "Evidence was offered by the plaintiff to show that McHugh said, when the agreement was executed, or when negotiation was going on, that Irwin intended to put up a furnace in one or two years, and that Marklesburg or McConnellstown was designated as the point; and it is claimed further that because that was not done this instrument is inoperative and invalid. We have been unable to come to the conclusion that this evidence is entitled to any force, either in construing the instrument or as evidence of fraud to be submitted to the jury." It would be going very far to hold that a man may be relieved from his deed by proof that when it was made promises were held out to him that were not performed, and that is the utmost that was exhibited in this case. Fraud, it is true, avoids all contracts, but fraud consists in false representations of things as facts which are not such, or in deceitful concealment of existing facts, neither of which is found in the evidence. The conveyance was not upon condition that furnaces should be built. If void, then it must be because deceit was practiced before it was made, or at the time of its execution. But a promise is not in itself a false and deceitful representation. Performance may have been intended when the promise was made. If so, there was no wrong done when the title passed out of the grantor, and certainly a failure to perform the promise can not revest a title after it has been divested. We agree with the learned judge of the Common Pleas that there was nothing in the evidence either to affect the construction of the contract, or from which the jury could find fraud to avoid it.

This is all that need be said respecting the errors assigned to the charge and to the answers to the plaintiff's points. None of them are sustained. There remain four bills of exception to the admission and rejection of evidence. The first is

that the court erred in admitting in evidence the record of the agreement between Garner and Irwin, without accompanying evidence of authority in McHugh to execute it in the name of Irwin. If we are correct in what we have said, this averment of error fails. We have thus far treated the instrument as not being the deed of Irwin. Yet it was Garner's deed and as such admissible. The question was thus ruled in *Bellas* v. *Hays*, above referred to.

The second bill of exceptions, probably, became immaterial under the ruling of the court. But if not, in view of the fact that the action was trespass *quare clausum fregit*, it is manifest that the evidence offered and received tended directly to reduce the damages and to show that the injury to the plaintiff, if any, was small.

The deposition of McHugh tended to prove the existence of sealed authority in him to seal the deed for Irwin. It is true this authority was afterward disproved, and the court put the case to the jury as if there was none. The plaintiff was, therefore, not harmed by the admission of the deposition.

As to the remaining bill of exceptions, it is enough to say that we are unable to discover what legitimate bearing the evidence offered by the plaintiff and rejected, could have upon any question in the case. Irwin had accepted Garner's deed long before the railroad was built, and before the mines were opened, and his title had been sold at sheriff's sale in the presence of Garner, without objection, before the plaintiff's right accrued.

The judgment is affirmed.

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ABANDONMENT.

1. *Abandonment of contract, when presumed.*—A contract may be abandoned otherwise than by words; the conduct of the parties, and their situations to each other, may be considered by the jury in determining whether, by mutual consent, the contract was treated as ended; and that the matter has been suffered to rest for three years is evidence to the jury as to a presumed abandonment. *Grove* v. *Donaldson*, 507

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ACCOUNT.

1. *Account stated—Interest—Appropriation.*—The balances struck in a passbook copied from a broker's ledger, from time to time, when brought to him, and at all other times retained by the defendant, to whom it was given for the express purpose of showing how his account stood, is an account stated, and will bind the defendant to pay the rate of interest therein stated, viz., two per cent. per month, notwithstanding a statutory provision that "when there is no express contract in writing fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum for all moneys," and money paid on account may be applied to the payment of such interest, if the debtor fails to make any appropriation. *Marye* v. *Strouse*, 294

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1. *Principal and agent—Ratification.*—The rule is that whenever a party undertakes to do an act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally responsible to the person with whom he is dealing on account of his principal. Ratification can only be effectual between the parties when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent. *Charles* v. *Eshelman*, 65

2. *Authority to draw post-dated drafts.*—The authority of an agent in charge of an iron mine to draw post-dated bills of exchange on his principal will not be presumed from his having so done before without objection, where there was nothing to show that the party relying on his authority knew that fact, and a long interval had passed since it occurred,

AGENT. *Continued.*

and the mine had meanwhile become prosperous and better supplied with ready money; and where in the former case the bills were drawn on time, being post-dated only long enough to give the drawee the benefit of the full period of discount after receiving them, while in the latter they were made payable at sight, and post-dated several weeks for the agent's private advantage. *New York Mine* v. *Citizens Bank*, 171

3. *Notice of equities to holder of draft.*—Where knowledge of circumstances that would excite suspicion in the mind of a prudent man on becoming the transferee of negotiable paper is not enough to affect the paper in his hands with pre-existing equities, he must have had actual notice of such equities, or, at least, knowledge of such facts and circumstances as would have made his taking the paper with the intention of enforcing it, an act of bad faith. *Id.*

4. *Advances, in name of principal, for agent's benefit.*—Parties discounting paper drawn by an agent upon his principal, are bound to act in the light of all facts within their knowledge bearing on his authority, and can not disregard any fact which might lead a prudent man to suspect that the agent is acting in fraud of his principal. *Id.*

5. *Agent, both buyer and seller.* The law does not permit an agent to purchase on account of another, that which he sells on account of himself. *Marye* v. *Strouse*, 294

6. *Ratification of act of agent.*—It is too late to dispute the authority of Stewart to make the contract, after accepting and paying for the services of Tierney for seven months; such acts furnish strong grounds to presume a ratification. *Boulder Valley Co.* v. *Tierney*, 381

7. *Sale to agent confirmed.*—Purchase of a share in a colliery in trust for the agent and manager confirmed under particular circumstances, but with reluctance; the sale to the agent disapproved and only allowed to save further loss. *Wren* v. *Kirton*, 408

8. *Refusal to agent to receive ore.*—A refusal to receive ore, made to E. B., who was named in the agreement as the person who was mining the ore which was the subject of the agreement, and who was employed by defendants in the work, is a refusal to his principals; and notice to them of the refusal would be unnecessary. *Grove* v. *Donaldson*, 507

9. *Agency and salary pending sale or company organization.*—If the owners of mineral lands enter into a written agreement with another person, reciting their purpose either to sell the lands or form a joint stock company for working the mines thereon, and promising, in consideration of services rendered, and to be rendered by him, to pay him a certain sum "out of the proceeds of the sale of said lands, if the same shall be sold, or if the lands shall not be sold, and a company shall be formed for working the mines thereon," then to convey to him stock to that amount, "it being understood and agreed by and between the parties hereto that the foregoing amount, whether of cash or stock, is to be a charge on the joint estate" of the owners; and he, in consideration of the foregoing agreements, promises to remain in their service as long as they may require, not exceeding one year, for a salary of $100 per month, and a house and lot free of rent; the owners of the land are not bound to sell the

AGENT. *Continued.*

same, or form a joint stock company, until by the exercise of reasonable diligence they are able to do so advantageously, having reference to the interest of all the parties, and until such sale, or the formation of such a company, or the existence of some negligence on their part, he has no claim against them, except for the stipulated salary. *Pinch* v. *Anthony*, 593

10. *Effects of an irrevocable power of attorney, made by corporation.* —The attempt of a board of directors to grant an agent of the company an irrevocable power of attorney, is a virtual dissolution of the corporation, and is therefore void. A corporation can only be dissolved in the manner provided by law. *Davis* v. *Flagstaff Co.*, 660

See BILLS AND NOTES, 7, 16; CONTRACT, 22; CONVERSION, 5.

AMENDMENT.

1. *Amendment discretionary.*—It is not error to refuse to allow the amendment of an answer when the defense relied upon is invalid. It is a matter of discretion, the abuse of which could alone justify interference by the appellate court. *Gillan* v. *Hutchinson*, 318

2. *Amendment in appellate court—Replication treated as complaint.* —An amendment will not be allowed in the appellate court changing a complaint on a *quantum meruit* into a complaint on a special contract; but where the defendant has set up the special contract in his answer, and the plaintiff has replied, the court will consider the issue as made on the special contract, the same as if plaintiff had declared on it. *Monroe* v. *Northern Pacific Co.*, 652

ANNUAL LABOR.

1. *Labor on mining claims.*—The proposition "that all efforts made and work done outside of the limits of the claim in dispute, with a *bona fide* intent to work the claims, are justly considered as work done upon the claims by relation and intendment," can not be maintained. *McGarrity* v. *Byington*, 311

2. *Entire year allowed for labor.*—If all things had been done except the labor, and the year in which to do the labor had not expired, strangers entering the ground become trespassers. *Atkins* v. *Hendree*, 328

APPEAL.

1. *Practice on appeal.*—On appeal from a judgment, this court will look into the evidence for an explanation of errors assigned. *Columbia Co.* v. *Holter*, 14

2. *Questions not raised below* will not be discussed or considered in the appellate court. *Spencer* v. *Kunkle*, 18

3. *Certificate to statement on appeal.*—The district judge certified the statement as follows: "The foregoing is the settled and engrossed statement on motion for new trial of the above entitled cause." *Held*, a substantial compliance with the statute. *Overman Co.* v. *American Co.*, 251

APPEAL. *Continued.*

4. *Review on imperfect record.*—The appellate court will not review the decision of the court below in refusing to sustain a motion for nonsuit when the grounds of the motion do not appear in the record. *McGarrity* v. *Byington*, 311

5. *Dismissal of appeal for delay in docketing.*—Under rule 9 of the Supreme Court, a writ of error or appeal (based upon any judgment or decree rendered thirty days before the commencement of the term) may be docketed and dismissed on motion of the defendant in error or appellee, unless the other side dockets the cause and files the record within the first six days of the term. But if no motion to dismiss be made in the meantime, the case may be docketed and record filed at any time during term. *Sparrow* v. *Strong*, 320

6. *Appeal—Auditor's report.*—No appeal lies from a judgment of the court of common pleas rendered upon the report of an auditor, in which the evidence is stated in detail, without submitting the auditor's report to the jury, or its being agreed upon by the parties as a statement of facts. *Chapman* v. *Briggs Co.*, 524

APPROPRIATION.

1. *Water rights—Diverting at different points.*—Defendants appropriated the water of Alder creek at a certain point in 1863, and in 1872 constructed a branch flume at another point higher up the creek and appropriated the waters thereof at this point also, sometimes diverting the water through one flume and sometimes through the other. Still later the plaintiffs purchased the land on the creek between the two points of diversion, but the land was vacant until after defendants had appropriated the water at both places. *Held*, that defendants owned the water and might divert it now at one point and now at the other. *Hobart* v. *Wicks*, 1

2. *Diligence.*—To constitute due diligence does not require unusual efforts or expenditures, but only such constancy in the pursuit of the undertaking as is usual with those in like enterprises—such assiduity as shows a *bona fide* intention to complete it in a reasonable time. *Highland Co.* v. *Mumford*, 8

3. *Appropriation, what constitutes.*—A declaration of a claim to water, unaccompanied by acts of possession, is wholly inoperative as against those who shall legally proceed to acquire a right to the same. By appropriation a man acquires only the right of possession and user of water, qualified by the right of others to its use, in such a manner as shall not materially diminish or deteriorate it at the place of his appropriation, in quantity or quality. *Columbia Co.* v. *Holter*, 14

See DITCH, 2; WATER.

APPURTENANCES.

1. *Miners' houses* are ordinary and proper appurtenants to coal mines, and when on the premises and included in the lease, are part of the estate, and all the remedies of a landlord attach to them, even without express stipulation. *Spencer* v. *Kunkle*, 18

APPURTENANCES. *Continued.*

2. *Description—Appurtenances.*—A sheriff's deed purported to convey certain property of the Monitor Company, known as the "Monitor claims," together with appurtenances. *Held*, that the mere fact that the Monitor Company purchased the Ohio Water Ditch and the water rights appurtenant thereto, would not constitute them appurtenances of the "Monitor claims." *Quirk* v. *Falk*, 19

See BRICK, 1; LEASE, 1.

ARBITRATION.

1. *Action by part of the board.*—Where parties agree to settle certain differences between them by submission of the matters in dispute to four persons, two to be selected by each party, the action of two persons selected by one of the parties will not be regarded as an arbitration under such agreement, so as to be binding on the other party. *Williams* v. *Schmidt*, 23

2. *Notice to parties.*—But even where the body of arbitrators is organized according to the agreement of the parties, it is essential to the regularity and validity of their action that such notice be given the parties as will afford them an opportunity to be heard. *Id.*

3. *Arbitration clauses* in deeds are not binding on the parties, so as to oust the jurisdiction of the court. *Mexborough* v. *Bower*, 92

ASSAY.

1. *Mines sold on report of assayer.*—C. and others agreed to sell to W. and M. certain silver mines in Colorado for $80,000, the sale to depend upon a satisfactory report from B., an assayer; the report to be subject to the approval of W. and M., and if not satisfactory to them, the agreement to be void. The purchase was made, but the ore proved to be of much lower grade than had been represented. The jury found that there was no fraud upon the part of C. *Held*, that W. and M. did not buy upon the faith of representations of the vendors, but upon the report of a competent assayer, and that their mouths were therefore closed against allegations of misrepresentation. *Weist* v. *Grant*, 28

2. *Ore contract construed.*—K. agreed to sell and deliver to S. 1,000 tons of ore for which S. agreed to pay $10 per ton, and for all ore having an assay value in excess of $60 per ton, one half of the value of such excess, in addition to the $10 per ton. *Held*, that the assays of all the ore delivered, should be averaged; and that K. could not recover the assay value of separate lots in excess of $60 per ton without taking into account the general average of all ore received *Kennedy* v. *Schwartz*, 679

3. *Difference in assays.*—A refusal by S. to adjust a difference in the assays as provided in the contract, would justify the court in adopting the plaintiff's assay if found to be correct. Neither party ought to reap a benefit by a failure to comply with the terms of the contract. *Id.*

ASSESSMENT.

See ASSIGNMENT, 1; STOCK, 1, 2.

ASSIGNMENT.

1. *Assignment to escape contribution.*—De Pass held 250 shares in the company which had cost him £1,750. About sixteen days before the winding up order he had transferred them to his clerk for £1. It was not disputed that he made the transfer to escape liability, but the evidence satisfied the court that the transfer was absolute, and it was *held*, that though the transaction was one requiring the most searching investigation, yet if made without any trust or reservation it should be upheld: and De Pass was discharged as a contributory, but without costs. *Mexican Co. In re*, 36

2. *Status of assignor, to the contract, after assignment.*—Plaintiff entered into a written contract with defendant to dig a ditch, he to be paid therefor in money, or part in water and part in money. He assigned this contract to L. & Co. to secure a debt, and authorized them to receive the payments. Plaintiff afterward demanded payment in water, which defendant refused to make, without giving any reason for the refusal. *Held*, that plaintiff, having assigned the contract, was not the party to make the demand, and that defendant had a right to refus · payment without stating any reason therefor. *Myers* v. *South Feather Riv. Co.* 542

3. *Effect of assignment of contract, as collateral.*—Where an assignment of a contract as collateral security, operating by its terms a change of ownership of the subject-matter, has been made, the title is supposed in law to remain divested until it be shown that the condition of the defeasance has happened, as in the case of a chattel mortgage. *Id.*

See LICENSE, 2.

ASSUMPSIT.

1. *Money paid.*—If a plaintiff has, at the request of defendant, discharged a sum of money or debt due from the defendant to any other person, by applying his own moneys, goods, chattels, securities or lands to such discharge, he may recover the amount so paid or satisfied, in an action of general *indebitatus assumpsit* for money paid, etc., but the plaintiff can not, upon such account, recover more money than he actually paid, whether the payment was made in money or in anything else. *Cook ads. Linn*, 49

2. *Special agreement must be declared on—"Ore tickets" as evidence.*—If a plaintiff has expended money for the defendant, under a special agreement, in a particular way or for a specific object, to be repaid at a given day, he may, after he has performed his part of the contract, and after the expiration of the time, recover the money so expended, in an action for money paid; but he can not, in such action, recover any advance or premium on his outlays, or any compensation for his risk or trouble, although by the terms of the special agreement the defendant was to make him such allowances. If the plaintiff goes for such additional compensation, he must declare upon and prove his special agreement. If the plaintiff, at the defendant's request, has taken up and paid off certain outstanding evidences of debts due from the defendant to other persons, not of a ne-

ASSUMPSIT. *Continued.*

gotiable nature, called "ore tickets," the mere production in court at the trial, of such writings, is not sufficient evidence that he has paid off and satisfied such debts, nor that he had done so before the action was brought; nor will such writings alone support an action for money paid, etc. *Id.*

See PRACTICE, 9.

ATTACHMENT.

1. *Garnishment—Uncertain interest.*—W. was garnishee in a foreign attachment against H. *Held*, it being a fair presumption from the facts that H. was equally interested with others in the contract, that there could be a recovery, without first proving his exact interest. *Weist* v. *Grant*, 28

ATTORNEY AT LAW.

1. *Attorney and client—Purchase by the former from the latter.—Query:* Can an attorney at law, under any circumstances, purchase *pendente lite* from his client the subject-matter of a litigation in which he is employed and acting? Equity will not uphold such sale, even upon a showing of good faith, where it appears that the attorney, while negotiating for the purchase of the property, was, at the same time, and as part of the negotiation, advising his client as to the probable outcome of the litigation concerning it. *Rogers* v. *R. E. Lee Co.*, 71

2. *Burden of proof to sustain.*—To sustain a sale from client to attorney, the burden is upon the latter, and he must show that he has done as much to protect the client's interests as he would have done in the case of his client dealing with a stranger. *Id.*

3. *Attorney must make full disclosure.*—An attorney, before consummating a purchase from his client, is bound to disclose to the latter the names of all persons interested with him in the purchase, especially when some of the persons so interested are partners of the client in the subject-matter of the litigation. *Id.*

4. *Parties interested with the attorney in such purchase.*—Parties interested with the attorney in such purchase, and who afterward take conveyances from him, can not be regarded as innocent purchasers, but such persons stand in the shoes of the attorney, so far as the rights of his client are concerned. If the sale is void as to the attorney, it is also void as to those interested with him as such partners. *Id.*

See PARTNERSHIP, 2.

ATTORNEY IN FACT.

See CONVEYANCE, 5; CORPORATION, 10.

BAILMENT.

1. *Pledge of stock held in trust—Quasi negotiability of stock.*—In California, mining stocks properly indorsed pass by delivery. T. & B., brokers,

BAILMENT. *Continued.*

held certain mining stocks as collateral security to the note of K., who knew that there was nothing upon the face of the certificates to indicate the real ownership. These brokers pledged both this note of K. and its collateral stock to S. & Co. to secure a debt of their own. *Held*, 1. That the transaction was valid as against K., so far as to deprive him of the stock without recourse against its holders, but being (from outside circumstances) a fraud under the Bankrupt Act, it was void as to the other creditors of T. & B. *Thompson* v. *Toland*, 77

2. *Sale of pledge without notice not void as to strangers.*—2. That a sale of stock by the pledgee, without previous demand and notice, gave no right of action to K., who was a stranger to the contract of pledge, but that such sale was a conversion of the stock as to the other creditors of T. & B., and that their assignee in bankruptcy could recover its full value from S. & Co. *Id.*

3. *Bailee without hire.*—A common carrier is not liable for goods carried without hire, where he has exercised ordinary diligence in the care of them. *Fay* v. *Steamer New World*, 417

4. *Facts of the case—Gold dust.*—Where a merchant was in the habit of having gold dust carried gratuitously from Sacramento to San Francisco, the owners of the boat uniformly refusing to carry it for hire or to become liable as common carriers, a quantity of gold dust was stolen without any neglect or fault on the part of the officers of the steamer, *held*, that the defendant was not liable therefor. *Id.*

See COMMON CARRIER.

BARRIERS.

1. *Barriers not required to support canal or prevent drainage therefrom.*—A canal company having the privilege of purchasing the subjacent minerals under act of Parliament can not hold the owner of the minerals responsible in damages for injuries occasioned by his mining for them upon the refusal of the company to purchase under the act, even though the working may cause the surface to subside. *Aliter*, where the house of one claiming under a grant from the owner of the soil is undermined. *Wyrley Co.* v. *Bradley*, 89

2. *Case against lessee for removing barriers.*—Case, in the nature of waste, will lie against a lessee of a mine for an injury to the reversion by the removal of coal barriers between it and an adjoining mine, although the act complained of might also be the subject of an action for a breach of an express covenant. *Marker* v. *Kenrick*, 98

3. *Right of action in both lessor and lessee.*—When an injury is done to premises while a party has a leasehold interest therein, the holder of such interest has a right of action for such portion of the damages as he has sustained, and the owner of the reversionary interest has also a right of action for his damages. *Bannon* v. *Mitchell*, 108

4. *Flooding from removal of barriers.*—Where the defendant in mining coal, passed over the line of his land upon that of the plaintiff and removed therefrom a quantity of coal left in its natural state as a barrier,

BARRIERS. *Continued.*

and in consequence of such removal, the water from defendant's mine flowed into plaintiff's mine in such quantities as to render further mining of coal impracticable, the plaintiff is entitled to recover substantial damages for the wrongful act of the defendant. *Id.*

5. *Injunction; prohibitory in form, mandatory in effect.*—Tenant of a mine covenanted to leave barriers, which covenant he broke, and opened access to other coal grounds. He was, on motion, restrained from permitting the communication complained of to continue open, the effect intended being to compel him to close the communication made, where he should have erected barriers, and to restrain drainage. *Mexborough* v. *Bower*, 92

BILLS AND NOTES.

1. *Payment in checks—Notice of dishonor.*—Plaintiff being the payee of two checks, for $201.20 and $99.80 respectively, indorsed them to the treasurer of the defendant company in payment of an assessment of $225, representing them to be "all right," and received in return a receipt for his sixth assessment and $76 in money. The drawer of the larger check failed on the day of this transaction, although he was solvent when he gave it ten days before, and was supposed by plaintiff to be solvent at the time of the indorsement. The check was duly presented at the bank and payment refused, and a few days later defendants notified plaintiff of this fact and requested him to make the check good, which plaintiff refused to do. *Held*, that defendants would not be enjoined from collecting the assessment; *held*, also, that plaintiff was not entitled to such notice as must be given upon the dishonor of a bill of exchange; but at most to such reasonable notice as would save him from loss, and that the brief delay in giving him notice did not appear to have occasioned any damage. *Small* v. *Franklin Co.*, 33

2. *Payable out of ore.*—An instrument by which a party promises to pay a certain sum at a stated time out of the net proceeds of ore to be raised and sold from a certain ore bed, is not a promissory note, it being payable upon a contingency. *Worden* v. *Dodge*, 116

3. *Payment with bill.*—The *manager* of a colliery having given a bill of exchange in discharge of a debt for an engine and the bill being dishonored, the creditor, unless he has purchased the bill out and out, has a right to resort to his original cause of action, and hold the *owner* of the colliery, therefor. *Tempest* v. *Ord*, 117

4. *Acceptance—President held personally liable.*—A bill of exchange was drawn by one agent of a company upon another agent, the defendant, in favor of a third, who indorsed it to the plaintiff in payment of wages due from the company. Defendant accepted the bill thus: "Accepted Sept. 14, 1846, John R. Livingston, Jr., President Rosendale M'ng Co., 16 Wall St." Upon suit brought on this acceptance it was *held*, that the bill was properly received in evidence, the addition to defendant's name in the bill being descriptive of his person rather than qualifying his

BILLS AND NOTES. *Continued.*

obligation; that the company was not bound by the acceptance and that defendant was individually liable. *Moss* v. *Livingston*, 119

5. *Bill of exchange—Acceptance—Want of authority—Personal liability.*—A bill of exchange, directed to the defendant thus: "To J. D., Purser, West Downs Mining Company," was accepted by him in these terms: "J. D., accepted per proc. West Downs Mining Company." J. D. was a member of the company, but was not authorized to accept bills on their behalf: *Held*, that he was personally liable. *Nicholls* v. *Diamond*, 121

6. *Acceptor, held personally.*—An order to pay to the drawer's order at a time certain after date, a sum of money for "value received in machinery supplied the Adventurers in Hayter & Holne Moor mines" was directed to the defendant, who wrote upon it "Accepted for the company, W. C., Purser": *Held*, that the defendant was personally liable as acceptor of the bill. *Mare* v. *Charles*, 124

7. *Agent—Liability and authority of.*—Suit was brought against the Ocean Mining Company, James Harter and S. N. Stranahan upon the following note: "Three months after date the Ocean Mining Company promise to pay W. G. Bright or order one thousand dollars, for value received, with interest at the rate of two per cent. per month." Signed, "James Harter, trustee, S. N. Stranahan," and judgment entered against all of the defendants for want of an answer. Harter and Stranahan appealed. *Held*, that the note showed upon its face that it was a company obligation and binding on the company alone, and not upon Harter or Stranahan individually. *Shaver* v. *Ocean Co.*, 130

8. *Coal sales—Notes running with the account—Discharge.*—Where a mining operator sold his coal to a dealer who, under his contract, immediately indorsed all notes received for sales to his customers, over to the operator as security: *Held*, that each note so indorsed was taken as security for the whole amount, including what coal had been or might be shipped; and that while any indebtedness existed from the dealer to the operator, payment of his note by the maker to the payee (the coal dealer) did not discharge the maker's liability thereon. *Held*, also, that the makers of the note were not discharged from liability by its presentment at bank where there were sufficient funds to meet it when due, if by mistake of the bank officers payment was refused, and the note protested for non-payment. *Hecksher* v. *Shoemaker*, 131

9. *Personal acceptance.*—A draft drawn upon one as treasurer of a mining company but accepted in his individual name, may be treated as his personal contract. *Lallerstedt* v. *Griffin*, 128

10. *Variance.*—Under the plea of *nil debet* the note produced in evidence must agree with the note sued on, and where the declaration counts on a note for $342, due two months after date, it is a fatal variance if the note offered in evidence call for $342.25, due sixty days after date. *Scott* v. *Baker*, 145

11. *Individual liability.*—A note subscribed "William Scott, President Blannerhassett Oil Co., W. H. Horner, Treasurer," is the individ-

BILLS AND NOTES. *Continued.*

ual note of the parties signing it, and they are personally liable therefor. *Id.*

12. *Burden of proof on fraudulent note.*—In suit by the indorsee of a note which is proved to have been obtained by fraud, duress, or upon an illegal consideration, the burden of proof is upon the plaintiff to show that he is a *bona fide* holder and for value. *Perkins* v. *Prout*, 139

13. *Official signature—Intention—Name in parol contract.*—Action against James Stuart upon a promissory note signed "Jas. Stuart, Gen. Mang. and Supt. St. L. & M. M. Co." *Held*, that Stuart might show *allunde* that it was intended by the parties to express that he acted as agent, and that the consideration moved to his principal. *Held*, also, that the name of the principal need not appear in the body of a parol contract. *Gerber* v. *Stuart*, 152

14. *Pleading—Variance.*—A variance between a note and the allegations descriptive thereof may be taken advantage of under the plea of *non est factum;* but in declaring upon a note signed by two parties, it is no variance to aver that the defendants—*the said Abram D. Bevan, by the name and style of A. D. Bevan*, made their certain writing obligatory, the words in italics being read as if in parentheses. *Peddie* v. *Donnelly*, 157

15. *Parol evidence affecting writing—Plea.*—A plea to *debt* upon a note, setting up the fact that the note was given for money borrowed by the maker to enable him to procure sale of plaintiff's mining property to be repaid in case of sale, and not until sale, the plea not stating that such contemporaneous agreement was in writing, presents no defense. *Id.*

16. *Parol evidence to explain ambiguous acceptance.*—A bill of exchange was drawn upon "L. Sinsheimer, Baltimore," by the L. F. & M. Co., payable to the order of plaintiffs. The drawee wrote across its face, "Nov. 20, 1874, accepted. L. Sinsheimer, Treas. L. F. and Mining Co." *Held*, that parol evidence was admissible to explain whether the acceptance was intended in an individual or official capacity. *Laflin Co.* v. *Sinsheimer*, 167

16. *Burden to prove agency, when denied.*—In suit on bill of exchange drawn by an agent, where the general issue defendant files affidavit denying the execution of the bill, the plaintiff has the burden of proving that it was drawn upon competent authority. *New York Mine* v. *Citizens Bank*, 171

17. *Local usage affecting mercantile law.*—Local usage can affect the general rules of mercantile and banking law only to a very limited extent, and under circumstances in which the usage must be considered as made by a party a part of his contract. *Id.*

18. *Post-dated drafts.*—A post-dated draft purporting to be payable at sight, is, for all the legal purposes of presentment, demand, protest and payment, a draft payable so long after date; but that authority to make time-paper shall be held to cover post-dated paper, their legal effect must not only be the same, but all their incidents so far identical, that both may fairly be supposed to have been in mind when the authority was given. *Id.*

BILLS AND NOTES. *Continued.*

19. *Peculiarities of post-dated draft—Agent's authority.*—Authority to an agent to give unusual business paper is not to be construed on technical reasoning, but on the actual intent. A post-dated bill of exchange differs from a bill made payable a corresponding period after it is drawn, in that the time bill may be sent forward meanwhile for acceptance, while the post-dated bill can not, and the drawee can not retain funds to meet it before its date as against other bills previously falling due. An agent's authority to draw bills of exchange payable on time or at sight, does not include authority to draw post-dated bills. *Id.*

20. *Misrecital of note instead of agreement.*—Where an instrument is not strictly a promissory note, owing to uncertainty in the amount expressed to be paid, the assumption by the court in its instructions that it is a note, is not error, where the measure of recovery is the same, whether it be styled a note or an agreement to pay money. *Penniman* v. *Winner*, 449

See AGENT, 2; CORPORATIONS, 5; STATUTE OF FRAUDS, 1.

BLASTING.

1. *Negligence immaterial where the act is unlawful.*—Where the act itself is unlawful the allegation of negligence becomes immaterial. The *result of blasting*, called by the court "the act of casting fragments of rock upon the plaintiff," *held*, to be *an unlawful act*. *Wright* v. *Compton*, 189

2. "*Reputation*" *of powder.*—A question concerning the *reputation* of a certain powder as a safe or dangerous blasting compound, is incompetent when the issue is as to the *safety* of the powder; but the opinion of a witness as to its safety, based upon his personal experience with the powder, is proper. *Sowden* v. *Idaho Co.*, 199

BOND.

1. *Title bond, giving option, construed as "nudum pactum"—Revocation—Performance.*—The execution and delivery of a bond conditioned to convey a mining claim upon payment or deposit of a certain sum within a given time, the bond not being signed by the obligee, containing no clause granting him possession during the option, and having no consideration expressed for the option given: *Held*, that until acceptance by the obligee, or the performance of some act equivalent to an election to purchase under the terms prescribed, such a bond is *nudum pactum*, and subject to revocation; *also*, that the taking possession under such a bond, and making improvements without objection from the obligor, would not render the bond irrevocable, nor could such entry be considered equivalent to an election to purchase, nor be construed into a performance. *Gordon* v. *Darnell*, 221

2. *Void for want of consideration.*—A bill for specific performance was brought, based upon a title bond by which the obligors bound themselves to convey the "Terrible Mine" to the obligees upon certain pay-

BOND. *Continued.*

ments being made. *Held*, that the bond was without consideration and therefore without validity. *Smith* v. *Reynolds*, 227

See PROSPECTING CONTRACT, 1.

BOUNDARIES.

1. *Monuments control course and distance—Variance in the calls.*—The courses and distances of a survey must yield to its monuments, whether natural or artificial. While a stump, hewed and marked, might be adopted as a location post, the descriptive survey should give both its real and assigned character. When the call in a location certificate is for a post, parol testimony is inadmissible to show that while a post is called for, a stump was in fact established as a corner. *Pollard* v. *Shively*, 229

2. *Parol evidence to explain ambiguities—Monuments.*—The general rule that parol evidence can not be admitted to contradict or control the language of a deed, but that latent ambiguities may be explained by such evidence, *held*, applicable to a location certificate. The rule is that where monuments are relied upon to control courses and distances, they must be found as called for. *Id.*

3. *Keeping up monuments—When necessary.*—Marking the boundaries of a claim operates to determine the rights of the claimant as against the government, and to notify third persons of his rights: and if a variation exists between the monuments and the courses and distances of the location certificate, it is necessary for the locator prior to patent to keep up his monuments to an extent that gives fair and reasonable notice to subsequent locators. *Id.*

4. *Side line posts.*—Posts placed opposite the discovery shaft 600 feet from one end and 900 feet from the other end of the claim, is a substantial compliance with the requirement of the statute that the side posts be placed in the center of the claim—as with the corner posts properly located the boundaries of the claim, with side posts so placed, can be "readily traced" by them. *Id.*

5. *Description—Ambiguity.*—A contract to convey land, bounded on the south by a line ten paces north of certain quarries, the face of the quarries being irregular, but having a general east and west course, *held* to mean a straight line from a point ten paces north of the east to a point ten paces north of the west extremity of the quarries. *Huffman* v. *Hummer*, 242

6. *Mistake—Estoppel—Subsequent purchasers.*—A disputed boundary line between the claims of two mining companies was finally fixed by mutual consent, and the property passed to subsequent purchasers; it was then discovered that the settlement was based upon a mutual mistake as to the true course of the line, but the purchases had been made with a view to the compromise line. *Held*, that the parties were estopped from disputing the correctness of the compromise line. Where one of two innocent parties must suffer, he who committed the mistake must bear the loss. *McGee* v. *Stone*, 238

BOUNDARIES. *Continued.*

7. *Fixing bounds by proof of neighboring lines.*—When claims are located by lines parallel to each other, the disputed line of any claim may be settled by proof of the existence of the neighboring lines, to which the disputed line is known to be parallel. *Stoakes* v. *Monroe*, 246

8. *Corporation not bound to line assented to by its superintendent.*—Testimony was introduced that the original stake of plaintiff 's claim was set at a certain point; that afterward another stake was set at a point which would exclude the ground in controversy, and that the officers and agents of the plaintiff 's company had for several years conceded the latter stake to mark the true boundary. *Held*, that the recognition of the latter stake by the officers and agents and their acquiescence to it as the boundary was not a concession of title to the ledge beyond, and did not bind the company; and it was further *doubted* whether the admissions of the officers and agents were evidence at all to fix the boundary. *Overman Co.* v. *American Co.*, 251

9. *Fixed objects control.*—Where boundaries are given with reference to fixed and known objects, they control courses and distances. *Kamphouse* v. *Gaffner*, 257

10. *Evidence.*—Where premises occupied by certain persons are referred to in a lease as a boundary of the premises leased, it is proper to admit evidence showing the location of premises so referred to, for the purpose of explaining the circumstances under which the lease was made, or of applying it to its proper subject-matter, or of raising and explaining a latent ambiguity. *Id.*

11. *Boundaries controlled by plat.*—Persons having mining claims on a certain quarter section of land before the same was open to entry, determined by arbitration the boundaries of their respective lots and had a plat made to show the boundaries thus determined. The quarter section was then surveyed, and one G. appointed for that purpose by the claimants, entered it for their benefit, and was instructed by them to deed, according to the plat, to the persons named thereon; and he testifies that in making his deeds he was solely guided by the plat, although it is not referred to in the deeds. The stakes put up to mark the boundaries of the lots as described in the deeds and designated on the plat, could not be found; but the boundaries on the plat can be readily ascertained by aid of the government surveys. The plat was never recorded. In a contest as to boundaries between parties claiming under deeds from G. of lots in such quarter section: *Held*, that the plat should have controlling weight in construing deeds. *Lampe* v. *Kennedy*, 266

12. *Fence called for, not necessarily a line fence.*—2. The deed under which defendants claim requires the south line of their lot (the line here in dispute) to be so run as to leave standing a certain fence on plaintiff 's lot. *Held*, that this does not purport to make such fence the south boundary of defendant's land; and that G. had no authority to change, by his deed, the boundaries fixed by the plat. *Id.*

BRICK.

1. *Brick kiln, not included in deed.*—Movables, such as bricks in a kiln,

BRICK. *Continued.*

do not pass in a deed of conveyance unless specially mentioned. The purchaser of a plantation who used brick from a kiln which he knew had previously been sold to another person, by his vendor, is liable to the owner for their value. *East* v. *Ealer*, 274

BROKER.

1. *Mining stocks.*—S. having ordered G., his broker, to buy certain stock for him, G. made the purchase and took the certificate in his own name, but offered to transfer the certificate to S. upon payment for the stock, but S. neglected to pay for the same, and G. afterward brought suit for the price thereof. On the trial the testimony was conflicting, whether S. had instructed G. to sell the stock at a particular time, and S. asked the judge to instruct the jury "that as plaintiffs held the stock, they could recover only the difference between the price paid for it and its market value on the day of their demand." *Held*, that the instruction was properly refused. *Giddings* v. *Seare*, 281

2. *Admission of value of services.*—W. rendered certain services for D. in the sale of coal lands, which occupied but a single day, and thereupon presented a bill to D., in which he charged $1,000 for his services. D. afterward brought suit to recover for the services rendered and obtained a verdict for $3,750. *Held*, that the estimate placed upon the value of his services in the bill presented by W. was an admission that $1,000 was all that his services were reasonably worth, and that the court below should have set aside the verdict, because the damages were palpably excessive. *Daniels* v. *Wilber*, 283

3. *Usage to pay on delivery.*—A receipt is only *prima facie* evidence of the payment of money; and a contract made in the Board of Brokers in San Francisco, acknowledging the receipt of money, having been delivered before the money was paid, it is competent to prove the habitual course of dealing among members of the board in like transactions, in order to account for the mistake. *Winans* v. *Hassey*, 285

4. *Commissions.*—Evidence that certain large sales of coal could only have been made through the particular brokers employed, *held*, to be competent upon suit to recover back commissions. *Carter* v. *Philadelphia Co.*, 287

5. *Broker's contract.*—An ordinary broker's contract, for the buying of stock, each share of which has a distinct and independent value, can not be regarded as entire. *Marye* v. *Strouse*, 294

6. *Custom—Broker's charges.*—A custom among mining brokers of charging each customer the full price of a telegram upon the receipt of a dispatch containing several orders, if it can be considered reasonable, ought to be established by very satisfactory proof, and it should also appear that both parties had knowledge of it. *Id.*

7. *Broker's license.*—One who brings an action to recover compensation for procuring a sale of coal lands under a special contract, need not show that he had a license to act as a real estate broker. *Shepler* v. *Scott*, 674

CLAIM.

1. *Mining claim may be sold on execution.*—The interest of a miner in his mining claim is property, and is liable to seizure and sale under execution. *McKeon* v. *Bisbee*, 309

2. *Right of entry on mineral lands.*—In the passage of the act of April 25, 1855, the legislature seems to have proceeded upon the idea that the right of a miner to enter upon the possessions of another, for mining purposes, was absolute and uncond tional, and the intention clearly was to limit the exercise of this supposed right, and not to give a right of entry in cases where no such right previously existed, and so far as it purports to give such a right, it is clearly invalid. *Gillan* v. *Hutchinson*, 317

3. *A mining claim has a legal money value* of such a nature as to be estimated and to allow of appeal to this court, as in other cases where "the value of the property in dispute" must exceed $2,000, as the basis of jurisdiction. *Sparrow* v. *Strong*, 320

4. *National recognition.*—Such claim may be a right acquired under the Mexican government; is recognized by territorial authority, and in any event has received national sanction by the acquiescence of the government in its acquirement. *Id.*

5. *Tenure of mineral lands.*—A statute of Cal., Pr. Act, § 380, provides in substance that any controversy which might be the subject of a civil action, may be submitted to arbitration "except a question of title to real property in fee or for life." *Held*, that under this statute an action for the recovery of mining ground on the public domain could not be submitted to arbitration. *Spencer* v. *Winselman*, 334

6. *Mining claims, real estate.*—Mining claims are real property and pass by deed. *Houtz* v. *Gisborn*, 340

COAL.

1. *Sale, by shipper, conditioned on receipts from mines.*—A contract by vendor, to ship coal as soon as it is received from the mines, with a *proviso* that the contract is not to bind if the coal company fail to deliver it to the vendor according to special arrangement recited, calling for *immediate delivery*, is a conditional contract. The coal company failing to deliver to the vendor, vendor is not bound to ship. *Neldon* v. *Smith*, 370

2. *Subsequent receipts of shipper—Option.*—If coal is received from the mines after the time named in the contract with the coal company, and intended in the contract between the parties, the seller is not bound to deliver it, nor is the buyer bound to receive it. The buyer has not an *option* to take it for the price named in the contract. *Id.*, 371

3. *Vendor and purchaser—Coal on wharf.*—Where the owner of coal lying on the wharf orders the wharfinger to deliver it to a purchaser, and the wharfinger agrees to deliver upon the purchaser paying the wharfage, the delivery is complete, so far as an execution creditor of the vendor is concerned. *Boswell* v. *Green*, 363

4. *Breach of contract—Waiver.*—In suit upon a coal contract for damages on account of the inferior quality of the coal delivered, and the failure to deliver within the time named in the contract, the defendants insisted that both claims were waived; the evidence was conflicting.

COAL. *Continued.*

Held, that the question of waiver was properly left to the jury. *Merrimack Co.* v. *Quintard*, 346

5. *Sale of coal "found."*—Plaintiff by indenture granted to defendant all the coals under certain land at £40 for every acre of coal which should be *found* within or under the premises, such consideration to be paid at the rate of £20 each half year. *Held*, that the finding of coal was not a condition precedent to recovery; that the word found meant "ascertained to lie and be"; that the plaintiff had parted with his title and possession of the coal, and it was for the defendant to show that coal did not underlie the land in order to defeat recovery. *Jowett* v. *Spencer*, 499

See COMMON CARRIER, 2; CONTRACT, 9, 13, 40–43; MEASURE OF DAMAGES, 3, 4; MINERALS, 1; USAGE, 1.

COKE.

See MINERALS, 1.

COLLIERY.

1. *Contract between mining company and transporting company.*—The defendants agreed to build a railroad communicating with the plaintiffs' mines, and to furnish the plaintiffs "the same transportation facilities and charge them the same price per ton for coal as they may or shall at the same time charge for tolls and transportation," etc., between other named points. The plaintiffs in consideration agreed to furnish the defendants all the coal they should mine to the amount of 1,000,000 tons, and not less than 600,000 tons in eight years, and pay to the defendants 2¼ cents per ton till the sum should reach $9,000, as security for their covenants. This was a covenant by the defendants to receive and transport all the coal the plaintiffs should mine and offer to them for transportation, not exceeding the contract limit; and to do this in the same manner and with the same diligence they should do for others, but not limited in quantity by the proportion of others. *Hazleton Co.* v. *Buck Mt. Co.*, 389

2. *Colliery a trade.*—The rule that a purchaser shall have possession from the quarter-day preceding the sale, does not apply to a colliery, which is an article of trade, the profits accruing daily. The proper period is the month or week in which the purchase takes place. *Wren* v. *Kirton*, 408

3. *Colliery, a trading concern.*—A colliery is to be considered as a species of trade; and the rule with reference to opening bids considered in reference to it as a continuing concern, and not as mere land. *Williams* v. *Attenborough*, 410

4. *Sale of colliery—Parol evidence.*—In an action on a contract for the sale of a colliery for a gross sum of money, to be paid at a certain rate per ton on the first coal mined therefrom, until the full consideration was paid, parol evidence is admissible to prove that at the time of the execution of the contract it was agreed between the parties that the vendees

COLLIERY. *Continued.*

should not be bound to mine the necessary amount of coal, and that the vendor should take the risk of their doing so; the English rule that parol evidence is inadmissible to vary the legal operation of an instrument does not obtain in Pennsylvania. *Chalfant* v. *Williams*, 548

5. *Benefit of working shaft confined to lands of party sinking it.*—The owner of coal lands entered into a contract by which they sold all the coal under such lands to a company, which company were bound to sink a shaft 230 feet for coal. At the same time they conveyed to the company ten acres of the land for about half its value. If a good vein was found within the 230 feet the company were to keep the land and pay a royalty of ten cents on each ton raised. If no such vein was found, they were to re-convey the land, and the owners were to refund the cost of sinking the shaft.

Coal was found and worked for some time, after which the company sold the land to another party, who began to drive a gallery to reach other coal of his own, intending to no longer work the lands of the parties who had caused the shaft to be sunk. The purchaser had notice of the contract. *Held*, that the intention of the parties was that the mining should be confined to the lands embraced in the contract, and the defendant was rightly enjoined from working other coal through said shaft. *Leavers* v. *Cleary*, 618

COMMON CARRIER.

1. *Liability for refusal to carry.*—Whether a common carrier of *goods and passengers merely* can be made liable in an action for refusing to carry *gold dust*. Query? *Fay* v. *Steamer New World*, 417

2. *Negligent unloading of coal.*—A railroad corporation does not discharge itself of its duty as a carrier by merely bringing goods to the terminus of its road. It is bound also to unload them with due care, and put them in a place where they will be reasonably safe and free from injury. In this case the railroad was held liable in damages for so carelessly discharging assorted coal as to mingle the different sizes, and also to mingle with soil, so as to render the coal unsalable. *Rice* v. *Boston & W. R. R.*, 419

3. *Ultra vires—Modification of contract, question for jury.*—A railroad company agreed to pay to a pipe line company a certain sum for each barrel of oil transported by the former in consideration that the latter would deliver all of its oil to the railroad company for transportation. The agreement was subsequently modified in such a way that it proved to be less favorable to the railroad company, and after one payment it refused to settle upon the new basis. The oil pipe line company accepted payment under protest on the basis first agreed upon, and brought suit for the balance due upon the contract. Defense, that the contract was *ultra vires*. *Held*, that to the extent the contract was executed, the plea of *ultra vires* would not be allowed, but it may be ground for rescinding the contract as to future transactions. *Held, also*, that in this case, there was sufficient evidence to justify the court in submitting to the jury the

COMMON CARRIER, *Continued.*

question of the subsequent modification of the contract. *Oil Creek Co.* v. *Penn'a Co.*, 421

See BAILMENT, 3, 4; COLLIERY, 1; CONTRACT, 46.

CONFUSION.

1. *Confusion of ores—Costs.*—Agent or bailiff, confounding his principal's property with his own, charged with the whole, except what he can prove to be his own; and in this instance, the case of a breach of the terms upon which the court dissolved an injunction, the inquiry was directed with costs. *Lupton* v. *White*, 430

2. *Directions to master.*—The court refused, in such a case, a prospective direction to admit books not legal evidence, usual in a fair case, as where from want of notice of an adverse claim, a strict account can not be given, merely giving liberty to apply upon any question of evidence. *Id.*

3. *Conversion by mixing, melting and manufacturing.*—The manufacture, by one of the tenants in common, of iron into iron-ware, after first sorting the iron with other iron, so that the common property could no longer be traced or identified, is a conversion of his co-tenant's share, with or without sale of the goods manufactured. *Redington* v. *Chase*, 439

4. *Preventing admeasurement of damages.*—If a party entitled under a contract to receive a profit from another, by his own act, so confound the measure of that which he was to receive that it can no longer be ascertained, he vacates his whole claim. *Pringle* v. *Taylor*, 458

CONSIDERATION.

1. *Failure of oil well.*—The fact that an oil well sold, fails to produce enough to justify working it, is not a failure of consideration. *Penniman* v. *Winner*, 449

2. *Statute of frauds—Oral agreement to contradict written lease.*—By a deed of indenture, defendant leased to plaintiffs certain mineral lands adjoining his own "diggings," and as a consideration therefor, plaintiffs covenanted to work the tracts of land demised to them in a good and miner-like manner, "and to use such machinery as might be necessary to unwater and work said tracts or mines, and to pay as rent" to defendant one sixth part of the mineral raised by them. In the present case the plaintiffs sue upon an alleged *oral* agreement, entered into on the day before said deed or lease was executed, but on the same day that the terms thereof were agreed upon; by which alleged oral agreement, plaintiffs were to put a pump into the grounds then being worked by them (being the same lands let to them by said lease) and to drain the water from defendant's "diggings;" and defendant was to pay them therefor one sixth of the mineral which he might take out of his "diggings" below the line at which the water would stand if the ground were not so drained by plaintiffs' pump. *Held*, that the alleged *oral* agreement was merely in the nature of one to pay plaintiffs for services performed on defendant's

CONSIDERATION. *Continued.*

land, and did not create any interest in such land, and was, therefore, not void by the statute of frauds. *Held*, further, that as it is not claimed that plaintiffs have done anything more by the use of their pump, than to "unwater" the lands leased to themselves, the benefits to defendants adjoining mine being merely *incidental* to this, evidence of such oral agreement tended in effect to prove an additional and different consideration from that named in the lease for unwatering their mines as there stipulated, and such evidence was inadmissible. *Townsend* v. *Peasley*, 612

3. *Injunction—Consideration.*—H. held stock of The C. F. Co., which at the instance of B. & Co. he transferred to the C. F. Co., through Van R., who paid H. therefor $5,000 cash, Van R. receiving from B & Co. their notes for the same sum. In payment for this service The C. F. Co. gave B. & Co. a note for $5,000. Upon motion to dissolve an injunction against the collection of this last named note, *held*, that there was a good consideration for the note of The C. F. Co., that it was no defense to an action on the note that B. & Co.'s notes had not been paid, and that the injunction would be dissolved. *Savage* v. *Ball*, 579

4. *Want of mutuality* is no defense except in cases of executory contracts. *Grove* v. *Hodges*, 699

See BOND; CONTRACT, 11; PARTIES, 4.

CONTRACT.

1. *Real and personal contracts distinguished—Stone severed from the realty.*—A widow who, under her husband's will, was entitled to one third of the proceeds of the farm and to occupy a room in the mansion house, brought suit before a justice of the peace on a note given to her for stone quarried from the farm. Defense that the justice had no jurisdiction, because the consideration of the note being stone, which was part of the realty, it was a real contract. *Held*, that a contract for the produce of land does not concern the realty, and the title to the land could not be brought in question. *Held*, also, that the true owner could not maintain trespass, because not in possession, nor assumpsit, because there was no contract with him. *Rhoades* v. *Patrick*, 62

2. *Subscription contract.*—A subscription paper signed with the number and amounts of shares attached to the signatures, is in effect a promise by each to pay the others; the promises are a sufficient consideration, one for the other, and the parties are sufficiently definite. *Kimmins* v. *Wilson*, 159

3. *Note for subscription.*—Such contract is a sufficient consideration for a note made by one of the subscribers promising to pay the amount specified to the treasurer of the organization. *Id.*

4. *Election as to amount to be delivered.*—A *carrier* agreed to transport for a *manufacturer* of salt from 1,200 to 5,000 barrels, annually, for three years, from the salt works to certain specified places for a stipulated reward *per* barrel: *Held*, that the *manufacturer*, not the *carrier*, had the right to elect what quantity of salt, not less than 1,200, nor more than 5,000 barrels, should be transported by the carrier annually. *White v. Toncray*, 463

CONTRACT. *Continued.*

5. *Incidental terms implied.*—As to that which is not expressed in a contract but must be implied, such as the time, manner and quantity of coal delivered, the law fixes a reasonable measure of performance which is to be regulated by the usual course of business. *Hazleton Co.* v. *Buck Mt. Co.*, 389

6. *Quantity to be carried.*—The plaintiffs while pursuing their mining operations in a reasonable and proper manner, were entitled to transportation for all the coal they mined and offered. *Id.*

7. *Relaxation of terms by consent.*—If parties mutually adopt a mode of performing their contract, differing from its strict terms, or if they mutually relax its terms by adopting a loose mode of executing it, neither can go back on the past and insist upon a breach because it was not fulfilled according to the letter. He may require a return to the terms in future. *Id.*

8. *Damages for shutting down work at mines.*—If the defendants, by refusing to furnish transportation, compelled the plaintiffs to desist from mining up to their reasonable production capacity, damages might be allowed for what would be the loss they suffered on the reasonable amount they were in due course mining. *Id.*

9. *Abrogation of mutual contracts.*—In mutual contracts one part is not to be abrogated or impaired by another, when that has an appropriate meaning which satisfies the words.

Examination and construction of a contract with mutual covenants for furnishing and transporting coal. *Id.* 390

10. *Accord, distinguished from continuing contract.*—When coal was accepted by the seller by a parol agreement with the coal company, after the breach in settlement of damages claimed for the breach, *held*, to be an accord and satisfaction, and not a delivery under the former contract. *Neldon* v. *Smith*, 371

11. *Consideration.*—The legal obligation to pay the price is a good consideration for the sale of goods. *Boswell* v. *Green*, 363

12. *Construction.*—The following is the contract sued on: "J. F. T. to B. V. Coal. Co. I do hereby contract, and hold myself responsible for the safe and prompt delivery of all the B. V. Coal Co.'s coal in the city of Denver, and to all parts of said city of Denver, and will hold myself responsible for all returns from C. O. D. orders, and all coal that may from time to time be delivered in the wrong place, so as the B. V. Coal Co. will be at no loss in any way connected with transporting of the said coal from their yard to the consumers of said coal, and that myself and all my teamsters will be always kind and accommodating to all whom they may have and do business with, for the sum of forty cents per ton, in large and small quantities, with stable and yard privileges included, for one year from June 1st, 1877, to June 1st, 1878.

"JAMES F. TIERNEY.

"*June 1st, 1877.*"

"J. F. T., Esq. I will accept the above proposition for and on the part of the B. V. Coal Co.

"By JOHN STEWART,
"*Superintendent.*"

CONTRACT. *Continued.*

Held, to be a contract binding upon both parties for one year, and that it was no defense to a suit for breach of contract, that the company had voluntarily discontinued the business by selling all the coal mined, at the mouth of the pit. The contract implies an obligation on the company to supply plaintiff with coal for delivery. *Boulder Valley Co.* v. *Tierney*, 381

13. *Coal for engine for mutual drainage.*—Defendant agreed to find sufficient coal for plaintiff's engine to draw water from the mines of both parties, *as they then stood*. Plaintiff sank to a lower seam, in draining which he necessarily drained the other two seams, but consumed for his engine more coal than before. *Held*, that defendant was no longer bound to furnish any coal, because plaintiff had destroyed the measure of sufficiency. *Pringle* v. *Taylor*, 458

14. *Delivery to administrator, after decease.*—Plaintiffs entered into an agreement to supply C. with a certain quantity of slate to be manufactured immediately: a further fixed quantity monthly, and a further quantity monthly as C. might require. C. engaged to receive the slate and the agreement was to be in force till January 1, 1838. *Held*, that plaintiffs might sue the administrator of C. for refusing to receive slate sent in pursuance of the contract, after C.'s death, and before the 1st of January, 1838. *Wentworth* v. *Cock*, 470

15. *Continuous supply to forge.*—Where A was the owner of a furnace, and B of a forge, and A agreed to furnish B with 500 tons of pig metal, as B should need such metal for manufacture, B is not entitled to demand and have delivered to him the whole amount at once: the obligation of supply is limited to the wants of B's manufactory, and B was bound to notify A from time to time of the wants of his establishment. *Rodgers* v. *Love*, 474

16. *Party making contract without power to fulfill, subsequently obtaining power.*—This bill was filed for the purpose of enforcing a contract for a lease of mines, at a rent of one fifteenth of the minerals obtained. The defendant had subsequently granted a lease to another party at the same rent. The bill charged that, under an act of parliament, it was directed that the best rent should be obtained by the owner of the mines, and although one fifteenth was a fair rent when the plaintiff's contract was entered into, that afterward, the mines having become more valuable, that amount was not then a fair rent, and the lease granted by defendant was therefore contrary to the act. *Held*, upon a demurrer for want of equity, that a party coming for performance of a contract could only have it as it actually existed, and that as the rent reserved in the plaintiff's contract was not the best that could be obtained, it was contrary to the act, and in effect fraudulent. The plaintiff, therefore, could not have his contract enforced, and the demurrer was allowed. *Held, also*, that it was an undeniable proposition, that when a party entered into a contract without having the power of performing it, and afterward acquired the right to do so, he was then bound to perform it. *Carne* v. *Mitchell*, 496

17. *Cleaning ore—Tools.*—A agreed to dig a certain quantity of iron ore annually, to clean it properly of all clay, sand, stone, etc., and deliver

CONTRACT. *Continued.*

it to B, who agreed to furnish all screens, ropes, and other implements necessary to work the banks. *Held*, that A was only bound so far to cleanse the ore as could be done with the implements furnished by B, using the same degree of skill and diligence as are ordinarily employed by persons in that business. *Held, also*, that such contract is indivisible. *Campbell* v. *Gates*, 502

18. *Determination.*—After A had performed his contract in part, B wrote him a letter alleging that the ore was not properly cleaned, and refusing to receive any more ore unless A would allow B to make the ore good by "docking" what had been, and what would be received. A then tendered ore, but B refused; unless the docking was agreed to. The contract was thereby terminated as to A at his election, and he may sue for the refusal to perform. *Id.*

19. *Quarrying—Rate of payment.*—Where plaintiff agreed to quarry stone at a fixed price or rate, and the contract was not fully completed, the rate agreed on must still govern as to the amount of stone which was quarried. *McClelland* v. *Snider*, 531

20. *Breach of contract.*—A contract for the delivery of stone, to be measured in the walls of a particular building is not broken by the stone being laid elsewhere, if they could there be measured. The object of such a statement in the contract was to furnish proper facilities for measurement. *Id.*

21. *"Fairly wrought" construed.*—There was a demise of coal lands at an annual rent, which was to cease when the coal could no longer be "fairly wrought." The court below left the meaning of the expression to the jury. *Held*, that the jury should have been directed as to the meaning of these words, and that they meant, such coal as could be fairly and properly gotten, according to mining usage, without extraordinary difficulty or expense, and that profit was not an exclusive test of their meaning. *Griffiths* v. *Rigby*, 528

22. *Conditional contract—Developing salt well.*—An instrument as follows: "April 29, 1841, Jacob Waltz, Jr., do promise to pay unto William Morrow the sum of $200 if said Jacob Waltz can get the salt well to do a good business; that salt well that Waltz and Morrow bought of Henry Taggart in Jefferson county, Ohio, on Island Creek." (Signed) "Jacob Waltz, Jr.," implies no obligation upon Waltz to endeavor to get the salt well to do a good business; and without such event no liability attaches. *Morrow* v. *Waltz*, 520

23. *Ore contract with furnace.*—An agreement by a corporation to purchase "all the iron ores the said company, their agents or assigns, may want for the use of their furnace for the term of three years" binds them to pay for ores delivered to and accepted by them, or their general agent, though not actually used by them. And the entries in their books are admissible in evidence to prove such acceptance. *Chapman* v. *Brigge Co.*, 524

24. *Agent's purchase ratified by corporation.*—N., the president and managing agent of the B. R. Co., purchased of plaintiff and Sharp, in the name and for the use of the company, a house, which was intended to be

CONTRACT. *Continued.*

used by the company as an office, and for other purposes. He paid $500 cash and gave a mortgage on the premises to secure the balance of the purchase money. N. had been in the habit of making such contracts as he deemed necessary for the company. The trustees of the company held several meetings in the house, and some six weeks after the purchase a resolution was offered, declaring the purchase legal and valid, but was rejected. Upon suit to foreclose the mortgage: *Held*, that N. had authority to make the contract to bind the corporation, and that if the authority were doubtful, the acts of the corporation amounted to a ratification of it. *Shaver* v. *Bear River Co.*, 587

25. *Married woman's contract void.*—After the rejection of the resolution N. made arrangements with a married woman to purchase the premises, and thereupon she paid $500, which was credited on the mortgage with the consent and approbation of plaintiff. *Held*, that the agreement was void, because the married woman had no capacity to contract, and the agreement to release the company and accept her as the purchaser was void for want of consideration. *Id.* 588

26. *Words below signature.*—Words added to a contract, following the signatures, may be shown by parol evidence to form parcel of the contract. *Verzan* v. *McGregor*, 565

27. *Receipt of goods, knowing the quality.*—If the purchaser of goods with full knowledge of their condition, voluntary receive them from a ship and pays the duties on them, he can not afterward set up the fact that the goods were not of a merchantable quality. *Fitch* v. *Archibald.* 555

28. *Facts of the case.*—F. agreed in writing to take of A. all the barytes he might deliver at Jersey City during that season, and pay therefor $12 per ton: *Held*, that under the agreement F. was entitled to have a merchantable article, and parol evidence could not be given to show that any particular lot or quality of barytes was intended. *Id.*

29. *Option—Time.*—M. contracted for the purchase of iron manufactured by the C. I. Works, but reserved the right to reject all white and mottled iron in excess of ten per cent. of the quantity of gray mill iron. *Held*, that such an option must be exercised within a reasonable time or the right be lost; and that a complaint as to the quality of the iron made nearly a year after M. had full opportunity to examine the iron, and after it had been weighed and paid for and M. had assumed control of it, was not within a reasonable time. *Carondelet Iron Works* v. *Moore*, 625

30. *Wharfage on stone—Contract liability determined by sale of realty.*—K., the owner of a wharf, and S., the owner of a stone quarry, agreed in writing that all stone quarried on the premises of S. to be carried away in vessels, should be delivered at K.'s wharf at four cents per ton, wharfage, for nine years, and after that period at five cents per ton, wharfage. The agreement was fulfilled upon each side for nine years, after which S. sold his quarry. *Held*, that K. could not recover for a failure by S. to carry to K.'s wharf the stone quarried after the sale, and that evidence to show that the usual price of wharfage for the nine years was five cents per ton, was incompetent. *Knowlton* v. *Sewall*, 591

31. *Tube well drilling, a service of personal skill.*—In *quantum meruit*

CONTRACT. *Continued.*

upon parol contract to drill a well, the question as to whether such contract was an undertaking requiring personal supervision was held properly left to the jury; and the jury having found in the affirmative, the sickness of the plaintiff was allowed as an excuse for discontinuing before the depth called for was reached. *Green* v. *Gilbert*, 694

32. *Deferred payments.*—Where, by the terms of a contract, certain payments are deferred, such payments become due by operation of law whenever defendant commits a breach of the contract, such as prevents the completion of the work. *Monroe* v. *Northern Pacific Co.*, 652

33. *Breach of condition.*—When, in the performance of a contract for labor, there are collateral conditions imposed on the party for whom the labor is done, the breach of such conditions justifies the abandonment of the contract by the laborer. *Id.*

34. *Construction of parties followed by courts.*—The construction given to a contract by the parties themselves, as shown by their acts under it, may be resorted to in determining the original intent at the time the contract was executed. *Leavers* v. *Cleary*, 618

35. *Quartz mill subscription.*—Certain persons subscribed money to build a quartz mill, in which all the subscribers were to be interested, and the money was to be paid in such manner and at such times as the majority of the subscribers might order. *Held*, not to be a subscription for the benefit of any particular person or corporation, but for the mutual benefit of all the subscribers. *Wheeler* v. *Floral Co.*, 622

36. *Mutuality in subscription.*—A subscription to the erection of a quartz mill can be recovered only upon pleadings showing a mutuality between the parties, and that the conditions of the subscription have been complied with.

37. *Void counter claim.*—A finding that an offset pleaded by defendant is a "proper matter of offset" will not be presumed correct if there are no averments in the answer to base such a finding upon. *Id.*

38. *Indivisible contract—Amount recovered.*—If plaintiffs were ready at all times to deliver the ore according to contract, and defendant failed to comply with its provisions, they would be entitled to recover the contract price for all ores delivered. But if defendant was ready and willing to receive the full 1,000 tons, in lots of 100 tons, as provided in the contract, but plaintiffs, notwithstanding the capacity of the mines enabled them to do so, refused to deliver the ore, they could only recover for each 100 tons indivisible, and would be liable for damages for breach of contract. *Kennedy* v. *Schwartz*, 679

39. *Measurement, "more or less."*—A contract to run a drift 180 feet, "more or less," is completed when 180 feet have been run. *Gerrens* v. *Huhn & Hunt Co.*, 632

40. *Material excess.*—On such a contract plaintiff sued for 384½ feet, but did not aver that the additional feet were run at the instance of defendant, nor that the defendant had promised to pay for the same. *Held*, that the complaint did not state a cause of action. *Id.*

41. *Divisible contract—Coal.*—A contract for the sale of a piece of land for a sum certain, and of coal under other lands payable by an annual

CONTRACT. *Continued.*

royalty, *Held*, on its face to be a divisible contract, but that parol evidence was admissible, that the land was necessary for vendee's enjoyment of the coal, and that it was the understanding at its execution, that the contract was entire. *Graver* v. *Scott*. 644

42. *Coal freight—Subsequent purchaser estopped.*—Certain persons at the expense of the V. Coal Company constructed a railroad from the center of a coal region to W., a station on the I. C. R. R., and on April 30, 1869, sold their road to the St. L. J. & C. R. R., and took from it an agreement, which among other things, provided that the purchaser would transport all coal from the V. Coal Company mines to W., at the rate of $3 per car, provided the coal company furnished the necessary cars and would enter into a contract to deliver all their coal destined for W., to the purchasers for transportation. On the day of the purchase the St. L. J. & C. R. R. sold and conveyed to the C. & A. R. R. the railroad just purchased; the last named company transported the coal at the price named in the original contract of sale for the period of three years, but afterward required $9 per car. Upon suit brought to recover the excess, to wit, $6 per car paid by the V. Coal Company over the original price agreed upon with the St. L. J. & C. R. R. it was *held*, that the C. & A. R. R., by carrying the coal at $3 per car, for more than three years, had given strong proof that they had adopted the contract of the St. L. J. & C. R. R., had thus put a construction upon their own obligations and were estopped by their own act and conduct. *Chicago R. R. Co. v. Chicago Coal Co.*, 634

43. *Act regulating freight construed.*—On the day that the C. & A. R. R. increased the charge to $9 per car an Act of the General Assembly went into effect, to prevent extortion and unjust discrimination by railroad companies. *Held*, that the act was not designed to reach the case of a contract to carry on certain terms, which existed prior to the passage of the act. *Id.*

44. *Condition precedent—Waiver.*—The execution of the contract by the V. Coal Company to deliver all their coal for transportation was not a condition precedent, and by executing the terms of the original contract both parties waived the necessity of a more formal contract. *Id.*

45. *Action on contract to enforce a lien, and for injunction and receiver.*—The plaintiff, E. D., brought suit against the F. S. M. Co. (limited), a corporation organized under the "Companies Act" of Great Britain, and others, alleging a purchase of ores to be mined from its mine in Utah Territory and delivered to him at rates fixed by the contract, which was evidenced by sale rates of the kind called in England "bought and sold" rates, and a breach thereof, by failure to deliver; also that he had advanced to the company $57,800, as payment on said ores—and by a subsequent contract, he had acquired a lien on defendant's mines and property. The plaintiff had a decree in the district court for $290,000 and interest, and an injunction was granted against defendant company and its lessor, F. W. B., and he was appointed trustee or receiver, to take possession of and work the company's mines, until the said debt to E. D. was paid off from profits, and also fixing the priorities of other creditors' liens and providing for their

CONTRACT. *Continued.*

payment accordingly. *Held*, first, that the evidence showed that the plaintiff, E. D., had loaned to the directors of the company the sums named in the ore contracts, to pay unearned dividends, and such loans being forbidden, all the parties to the contract, knowing the purpose for which such dividends were made and used, they were fraudulent and void. *Held*, second, that the contract upon which plaintiff claimed to found a lien, was based on the ore contracts, and that the stockholders having never ratified the ore contracts, or the contract providing for their payment, they were fraudulent and void, as against the company and the other defendants. *Held*, third, the directors of the corporation had no power to ratify the ore contracts. *Davis v. Flagstaff Co.*, 660

46. *Mutuality of contract.*—Where, by the terms of a contract, one party is bound to do a certain thing, and the other can perform his part at his own option, the contract is not mutual or binding on either party. *Id.*

47. *Carrier—Exchange of stone between quarries.*—Plaintiff was engaged in transporting stone, and for his own convenience procured the owners of two separate quarries of stone of the same quality to allow orders on quarry A, to be filled from quarry B, and *vice versa*, in about equal quantities. The owner of quarry A demanded payment for the stone so delivered from his quarry, and the carrier advanced it, whereupon the debt was assigned to him. *Held*, that in suit by the carrier against the owner of quarry B, that the contract was one of *exchange* between the quarrymen, and that no cause of action existed against the defendant. *Wheeler* v. *Johnson*, 642

48. *Clause in coal contract construed.*—C. agreed to pay B. a certain sum of money on condition that B. would deed to an iron company what land they wanted for steel works, and would also procure from the iron company a contract to take from C. such quantities of coal as might be required for their steel works. B. also owned the coal banks worked by C., and received a royalty upon all coal taken therefrom. B. deeded the necessary land to the iron company, and procured from it the contract for coal for the benefit of C., but the latter refused to sign the contract because it contained a clause that in the event of a failure by C. to furnish the requisite amount of coal, B. might bring suit at his own proper costs and expenses for such neglect. *Held*, that this clause did not impose any additional burden upon C., nor vary the terms of his contract with B. *Beard* v. *Converse*, 670

49. *The fact that a sale is of several parcels* of land, with a particular price apportioned to each, does not make the contract necessarily severable; exceptional conditions may exist which necessitate its being treated as an entirety in equity.

See ABANDONMENT, 1; ASSAY, 2, 3; ASSIGNMENT, 2, 3; COAL, DELIVERY, DEMAND, EVIDENCE, 9-13; FAULT, 1; GUARANTY, SALE, TIME.

CONVERSION.

See CONFUSION, 3; MEASURE OF DAMAGES, 5; STOCK, 4.

CONVEYANCE.

1. *Proof of signing conveyance.*—C., the subscribing witness to a bill of sale, being out of the State, T., the grantee, swears that he saw C. witness it, and D, the grantor, sign it, and that he recognized the paper from the contents read to him, though not able to read himself. L. swears that the signature of C. is in his handwriting. *Held*, that the paper was sufficiently identified to be read in evidence. *McGarrity* v. *Byington*, 311

2. *Idem.*—Testimony by a subscribing witness that a paper was signed in his presence "to the best of his recollection" sufficiently identifies it to be read in evidence. *Id.*

3 *Deed—Condition construed—Escrow.*—Where White, in consideration of $1,500, conveyed an undivided interest in certain mining claims by deed, containing the following condition: "The said Beem shall pay to the said White all the dividends that shall at any and all times be declared to one twelfth of said claims, also all the proceeds of his wages due him for labor in said claims, after receiving $10 per week for his own support, until the amount paid shall equal the sum of $1,500, with interest mentioned above; then this bill of sale shall be given unto the said Beem by him who may have it in possession, thereby giving unto the said Beem full possession and control of said property."

Held, that Beem was bound to contribute his labor on the claims until his labor (less $10 per week reserved) and the proceeds of the claim, equaled the price to be paid.

Held, further, that the deed was but an escrow in the hands of McKusick, the holder, and B. was entitled to nothing more than delivery of it, and was only entitled to this on strict compliance with the stipulations of the contract on his part. *Beem* v. *McKusick*, 533

4. *Estate upon condition—Forfeiture—Quartz mill engaging to drain mine by its steam power.*—A written agreement, by which upon certain "terms and conditions" the parties of the second part were permitted to erect a steam quartz mill upon the surface of the mine owned by parties of the first part, and by which it was made the duty of the parties of the second part to finish the mill within a certain time, and afterward, among other things, to keep the said mine free from water, hoist ore, etc., by means of the steam power of the mill, gives the parties of the second part an "estate upon condition" in their improvements. *Held*, further, that upon refusal to pump the mine, a forfeiture was created by breach of condition. And that such forfeiture might be enforced, after demand for possession, without actual entry. *Hamilton* v. *Kneeland*, 583

5. *Deed under seal by attorney without power under seal.*—A license of the privilege to exsect iron ore at a certain rate per ton, containing covenants signed, "Michael Garner [SEAL], William Irwin [SEAL], by agent, Miles McHugh." *Held*, that McHugh, not being attorney in fact created by instrument under seal, and Irwin never having confirmed the instrument by deed, that it was not his deed. But that having accepted the benefit of it, he was liable as upon a parol contract. *Grove* v. *Hodges*, 698

See COAL, 5.

CORPORATION.

1. *Private company performing corporate acts.*—Neither trading as a company, nor the issue of shares transferable to *bearer*, make the company illegal on the ground of usurpation of corporate franchises. *Mexican Co. In re,* 36

2. *Control of company.*—The instruction "The defendants had a large majority of the stock, therefore the control of the company was entirely in their hands," *held* to be erroneous; the fact being that defendants had but two out of five directors. *Carter* v. *Philadelphia Co.,* 287

3. *Removal of secretary.*—Proof that the secretary of the company was removed because he could no longer endure the rule of C. & S. was improperly admitted, the reason not having been made known to them. *Id.*

4. *Officers de facto.*—The acts of the *de facto* officers of a mining corporation are valid whenever they concern third persons who had a previous right to demand the act, or have paid a valuable consideration for it. *Savage* v. *Ball,* 579

5. *Note of insolvent corporation.*—The insolvency of a mining company does not of itself invalidate a note given for a *bona fide* debt. *Id.*

6. *Power of corporation.*—A corporation has no powers except such as are granted by its charter or by necessary implication. *Davis* v. *Flagstaff Co.,* 660

7. *Limit of power in case at bar.*—The defendant company was limited in its power to negotiate loans by its articles of association, and the directors had no authority to borrow money beyond that granted, and in the manner specified; and it was prohibited from paying dividends, except from profits. *Id.*

8. *Notice of powers of corporations.*—The plaintiff, E. D., was not an innocent party. Actual knowledge that the company had no power to make the loan is not necessary to be shown. He is bound to take notice of the director's powers, for it is found that in the case at bar the plaintiff had knowledge of the want of power on the part of the directors, as he was an incorporator, and one of the first board of directors. He was a dealer in stock of this and like companies, and must have known the extent and scope of the company's power. *Id.*

9. *Contract for a lien.*—The subsequent contract for a lien on the mine construed and held not a lien, but void and no mortgage. *Id.*

10. *Irrevocable power of attorney.*—An effort in such contract to make one "P." the irrevocable agent of the company, *held* to be beyond the powers of the corporation or directors, and void. *Id.*

See COMMON CARRIER, 3; RECEIVER, 1.

COSTS—See CONFUSION, 1.

DELIVERY.

1. *Sale when complete—Intention.*—Where it is clear, by the terms of a contract that parties intend that a sale shall be complete before the article sold is weighed or measured, the property will pass before this is done. *Boswell* v. *Green.* 363

2. *Immediate delivery defined.*—The term "immediate delivery" ex-

DELIVERY. *Continued.*

plained to mean among coal shippers and dealers a delivery within the present, or in some cases, the preceding month, and thus interpreted in the contract. *Neldon* v. *Smith*, 371

2. *Delivery of oil.*—Upon contract to deliver oil barrels on board of boats "preparatory to running out on the first water," the barrels to be paid for on delivery, *held*, that the vendor was bound to load the barrels, or at least to notify the purchaser of his readiness to load them, and that merely having them in readiness on the bank without notifying the purchaser until after the rise of the water, did not sustain the defense of performance or readiness to perform. *Cullum* v. *Wagstaff*, 573

DEMAND.

1. *Pleading.*—Where from the nature of the agreement a special demand is necessary, but the declaration fails to aver such demand, such omission will be cured by verdict; it will be presumed that a recovery would not have been suffered by the court, unless a special request had been proved. *Rodgers* v. *Love*, 474

2. *Demand in cases of election.*—When there is an election to be made as to the thing to be received in payment, there must always be a demand. *Myers* v. *South Feather Co.*, 542

DEPOSITIONS.

1. *Discretion—Reasonable notice.*—Plaintiff's attorneys offered several objections to the admission in evidence of certain depositions, based upon the fact that the copy of the order of the judge for taking the depositions, upon which they had acknowledged service in writing, was not a perfect copy, in that it did not mention the notice to be given. But the objection was overruled. *Held*, that the court properly exercised its discretion. *Held*, also, that reasonable notice should be given to a party, of the time and place of taking testimony; but what is reasonable notice depends upon the particular circumstances. *Attwood* v. *Fricot*, 305

DESCRIPTION.

1. *Construction—Duty of court and not of jury.*—An instruction which tells the jury that in locating lands described in a lease, they should consider all the words used in the lease, having reference to the description or location of the land, and that words denoting merely bearings or directions must yield to words referring to fixed objects or monuments, is objectionable, in not construing the lease and informing the jury the precise words of description which control, instead of allowing them to determine the fact for themselves. *Kamphouse* v. *Gaffner*, 258

DISTRICT RULES.

See FORFEITURE, 1; POSSESSION, 1.

DITCH.

1. *Evidence—Mining claims—Flume.*—F. owned certain mining claims with a tail flume thereon for working the claims. C., who owned claims below F., commenced to construct a ditch below the lower end of

DITCH. *Continued.*

F.'s flume but upon F.'s claims, for the purpose of appropriating the water from F.'s flume to be used in working C.'s claims. F. extended the flume, still keeping in his own claims, so that the waters from the flume could not be turned into C.'s ditch. Upon suit brought by C. to abate the extension of F.'s flume as a nuisance, it was *held*, that evidence which tended to prove that the portion of F.'s claims through which C.'s ditch was cut was worthless for mining purposes, and also that the extension of F.'s flume was not beneficial to the working of his claims, was improperly admitted. *Correa* v. *Fristas*, 336

2. *Appropriation.*—The instruction that if C. was the owner of a mining claim on the same ravine, but below F., he had a right to use the natural waters of the ravine for the purpose of working his claim, and could lawfully construct a ditch upon F.'s mining ground for that purpose, provided it did not interfere with F. in the perfect enjoyment of the ground for mining purposes; that one person might appropriate public mineral land for mining p rposes and another party use the same for a different purpose, provided the different uses did not conflict—*held* to be erroneous. *Id.*

DURESS.

1. *Moral duress—Voluntary payment.*—The payment of $9 per car by the V. Coal Company, when they had no other means of conveying their coal to market, was not a voluntary payment, but a kind of moral duress. *Chicago R. R. Co.* v. *Chicago Coal Co.*, 634

EJECTMENT.

1. *Abandonment—Separate veins.*—Defandants in ejectment may show abandonment or they may show that the lode they entered upon was a separate vein. *Atkins* v. *Hendree*, 328

ESCROW—See CONVEYANCE, 3.

ESTOPPEL.

1. *Estoppel by silence.*—It is not the making of improvements or expending of money on another's property which entitles the person so expending to hold the property, or even the improvements; but it is the fraud of the owner, who silently, or otherwise, encourages the expenditure. *McGarrity* v. *Byington*, 311

See BOUNDARIES, 6.

EVIDENCE.

1. *Sheriff's deed—Execution.*—The party relying on a sheriff's deed, must produce not only the judgment and the sheriff's deed, but also the execution under which the property was sold. *Quirk* v. *Falk*, 19

2. *Burden of proof.*—A party who claims certain water rights under a sheriff's deed purporting to convey the "Monitor claims," with appur-

EVIDENCE. *Continued.*

tenances, has the burden of proof upon him to show that they are so appurtenant. *Id.*

3. *Admissions—Misleading charge.*—Where an instruction was given in a case of dispute between adjoining mining companies as to their boundary that "when boundaries have been established, defining and denoting the size and limits of the claim upon the surface, and for a long period have been recognized as such, the extent of the claim will be confined to the extent as manifested by such surface boundaries"; and the state of the testimony was such that the instruction applied to or was apt to be understood by the jury to refer to a fixing or recognition of boundaries after the consummation of the original location, and consisting merely in the declarations of superintendents, and other officers not authorized to fix boundaries—*Held*, error. *Overman Co.* v. *American Co.*, 251

4. *Tenure of claim—Admissions as to extent.*—After a vested right to a claim has been acquired by compliance with the law, it is not held by so precarious a tenure that it can be reduced by mere declarations of superintendents or officers.

Dictum as to admissions of officers as evidence, with citation of authorities, but no decision. *Id.*

5. *Irrelevant testimony.*—A judgment will not be reversed because of the admission of irrelevant testimony unless it is clearly made out to be irrelevant, and even then it ought to be shown that the proof tended to mislead or unduly influence the jury. *McGarrity* v. *Byington*, 311

6. *Mining records as evidence.*—The original record of mining claims having been destroyed, plaintiff was allowed to introduce a new record of mining claims which had been prepared in pursuance of a resolution of miners requiring claims to be recorded; *held* to be competent to prove that the claim had been recorded according to the rules of the vicinage. *Id.*

7. *Testimony which is prima facie irrelevant* is properly excluded unless counsel explain how it is admissible, or offer to connect it. *Id.*

8. *Variation in freights.*—Testimony that freights were usually higher in autumn than in summer, upon suit for damages for delay in delivering coal, is clearly competent. *Merrimack Co.* v. *Quintard*, 346

9. *Copy of contract.*—It is not error to admit a copy of contract in evidence instead of the original when the contract is set out in *hæc verba* in the complaint and the answer does not deny the execution of it but only denies the authority of the agent who signed it. *Boulder Valley Co.* v. *Tierney*, 381

10. *Contract contradicting terms of sale.*—Plaintiff sold an oil well and oil lands adjacent for a consideration part paid in cash, part in stock, and the balance by the note in suit, as evidenced by written contract. The note was afterward delivered to defendant for collection. In an action of trover brought against him for its conversion, he offered to prove that it was parcel of the terms of sale that plaintiff should contribute toward the purchase money in proportion to his stock, and that the note was left with defendant upon the understanding that such amount was to be credited on the note. *Held*, that the evidence was inadmissible, being

EVIDENCE. *Continued.*

in derogation of the written contract and of the note itself, and not a collateral contract. *Penniman* v. *Winner*, 448

11. *Proof of unfair motive.*—Proof of a motive to unfairness corroborates the proof of unfairness, and renders it more credible. *Hazleton Co.* v. *Buck Mt. Co.*, 389

12. *Parol evidence to prove quality.*—Where there is any doubt about the identity of the article agreed for, parol evidence may be given to identify it; but where the agreement is for a known article of merchandise, parol evidence is not admissible to show that it was to be of a certain kind or quality. *Fitch* v. *Archibald*, 555

13. *Contract must be proved as laid.*—Where money was to be paid upon the sale of certain mining property, the plaintiff must show that the property has been sold before he can recover. *Cheney* v. *Barber*, 692

See BILLS AND NOTES, 10, 12-16; BOUNDARIES, 2, 10; COLLIERY, 4; CONSIDERATION, 2; DEPOSITIONS, DITCH, 1; NEW TRIAL, 1; TIME, 4.

EXECUTORS AND ADMINISTRATORS—See CONTRACT, 14.

FAULT.

1. *Fault in mine—Hardship.*—Where it was agreed that defendants would deliver a certain quantity of iron ore, which was to be the ore mined by E. B. on the lands of either Montgomery or Frick, and the plaintiff afterward refused to receive any more ore from the Montgomery mine, and it appeared that there was sufficient ore in the Montgomery mine to fulfill the contract, but that a fault existed in the Frick mine which rendered it expensive to work, the defendants were thereby excused from delivering any more ore.

It was not error under such a state of facts for the court to instruct the jury that it would be a hard case to subject the defendant to heavy damages. *Grove* v. *Donaldson*, 507

FLOODING—See BARRIERS.

FORFEITURE.

1. *District rules.*—A right of property, once attached in a mining claim, does not depend upon mere diligence in working it, and a failure to comply with *any one* of the mining regulations is not a forfeiture of title. It would be enough to hold the forfeiture as the result of a non-compliance with *such* of them as make non-compliance a cause of forfeiture. *McGarrity v. Byington*, 311

See CONVEYANCE, 4.

FRAUD.

1. *Fellow shareholders not liable for directors' fraud.*—Where shares, though fraudulently issued by the directors, are purchased in open market, the purchasers, whatever their rights as against the directors, have

FRAUD. *Continued.*

no claim to relief against other shareholders. *Mexican Co., In re,* 36

2. *Misrepresentations made to third parties.*—Where fraudulent representations are relied on to defeat a contract, proof of other like representations made by the same party about the same time to other persons in and about the same project, is admissible to show the intent with reference to the false representations made to the plaintiff. *Perkins* v. *Prout,* 139

3. *False representations by one subscriber.*—Where one of such subscribers has made false representations to another of such subscribers, the others are not bound by such representations, and the contract is not invalidated as between the party deceived and the others. *Kimmins* v. *Wilson,* 159

4. *Opinions.*—Expressions of opinion distinguished from material representations. *Id.*

5. *Misrepresentation—Ratification—Usage.*—H. gave D. an order to buy 500 shares of P. mining stock, deliverable at any time at buyer's option, in sixty days and three days grace, with interest at a price not exceeding $2 per share. D. bought the stock on thirty days at $1.62½ per share. H. and D. afterward exchanged, bought and sold contracts in which the P. stock was stated as bought at $1.75 per share, and D. afterward made a written statement of account with H., in which he was charged with the P. stock at $1.75 per share, with interest and brokerage. H. gave his note in settlement of this account, in ignorance that his order had not been duly executed. Upon suit brought on the note, it was *held* that the acts of D. were equivalent to a misrepresentation of material facts, and induced H. to give his note under the deception; *held, also,* that the exchange of bought and sold contracts did not ratify the purchase by D., because H. was ignorant that his order had not been duly executed; *held, also,* that a usage among brokers to buy on shorter time than ordered, and carry the same until the maturity of the contract and to charge brokerage for so doing, can not be supported. *Day* v. *Holmes,* 276

6. *Promise not performed no false pretense.*—A man can not be relieved from his deed by showing that at the time of its execution promises were held out to him which have not since been performed. Fraud, it is true, avoids all contracts, but a promise is not in itself a false and deceitful representation, because performance may have been intended. *Grove* v. *Hodges,* 698

7. *Opportunity to inspect.*—The plaintiff can not recover on the ground of fraud, when, before the bill was rendered, he had every opportunity to inspect the iron, and no concealment was used or representation made to induce the plaintiff to believe that the iron was of any particular grade, or to prevent an examination into its quality. *Carondelet Iron Works* v. *Moore,* 625

8. *Stock sale—Caveat emptor—Infancy.*—Complainants owning certain real estate in Detroit, of the value of $1,600, sold the same to defendant, and received in exchange certain copper stock and defendant's note. Before delivering the stock defendant directed complainants to make inquiries as to its value, and not to rely upon his, defendant's, representations

FRAUD. *Continued.*

or estimate. The stock proved worthless. The vendor of the realty, and the parties who received the stock, were an illiterate German woman only slightly acquainted with the English language, and her daughter, aged sixteen years. *Held*, that in such case, where parties stood upon equal terms as to their opportunity of obtaining information concerning the subject-matter of sale, each must rely upon his own judgment and means of knowledge; but the conveyance as to the daughter was set aside upon the ground of infancy, as of course. *Beeker* v. *Hastings*, 688

See AGENT, 5; ASSAY, 1; STOCK, 5.

GARNISHMENT—See ATTACHMENT, 1.

GOLD DUST—See BAILMENT, 4.

GUARANTY.

1. *Guaranty on ore digging contract—Delivery—Notice.*—Plaintiff was digging ore for William Church, under a written contract to dig it as fast as it was wanted, when he refused to dig any more unless he was secured on the contract, whereupon the defendants indorsed a guaranty upon the contract. The contract was then handed to a third party to be delivered to plaintiff. *Held*,

1. That the delivery was perfect without notice to defendants that plaintiff had accepted their guaranty.

2. That notice of refusal by the original contractor to pay was not necessary to be given to the guarantor before action.

3. That notice of the amount due was not necessary to be given to the guarantors. *Bushnell* v. *Church*, 479

2. *Proof of insolvency.*—The insolvency of the original debtor being proved, a deed of indemnity from such debtor to his debtors is admissible to prove both the time of such insolvency and that the guarantors had received no damage from want of notice. *Id.*

3. *Guarantor bound by principal's acts.*—The directions given by the original contractor to his employes are admissible in evidence against, and binding upon the guarantors of the contract. *Id.*

INFANCY—See FRAUD, 8.

INJUNCTION—See BARRIERS, 5; CONSIDERATION, 3; CONTRACT, 45.

INSOLVENCY—See GUARANTY, 2.

INTEREST—See ACCOUNT, 1.

JUDGMENT.

1. *Final judgment under code practice.*—The judgment of a Territorial Supreme Court affirming judgment below upon appeal from order denying a new trial, treated as a final judgment upon which writ of error could issue. *Sparrow* v. *Strong*, 320

See PRACTICE, 5.

LACHES—See SPECIFIC PERFORMANCE, 2.

LEASE.

1. *Two leases*, the first of coal mines, the second of miner's houses on the same premises, the second being made in terms subject to the former, are properly treated as one entire demise. *Spencer* v. *Kunkle*, 18

See BOUNDARIES, 10; CONTRACT, 21; DESCRIPTION, 1.

LICENSE.

1. *License to work mines can only be granted by deed.*—Every license that authorizes such acts as are not only required to be performed upon the land, but which gives some usufruct of the land itself, is properly a grant of an incorporeal hereditament, and must be created and transferred by deed. *Kamphouse* v. *Gaffner*, 258

2. *License by parol good until revoked—Not transferable.*—A parol license to mine on land is a protection against an action of trespass for acts done under it before revocation, but it is revocable at the will of the licensor, and can not be transferred to another. A subsequent conveyance or leasing of the premises amounts to a revocation of license, whether by deed or parol, unless such license is coupled with an interest and executed. *Id.*

LIS PENDENS—See PLEADING, 6.

LOCATION—See BOUNDARIES.

LOCATION CERTIFICATE.

1. *Purpose of.*—A recorded certificate of location is a statutory writing affecting realty, being in part the basis of the miner's exclusive possession and enjoyment of his mining location granted by the act of Congress of May 10, 1872. The purpose of description is to identify the claim with reasonable certainty. *Pollard* v. *Shively*, 229

LODE.

1. *Surface—Claim confined to single vein.*—The locator is confined to only a single vein, but a later party can not enter into his lines to prospect for a second vein. The locator is entitled to the surface, and the second vein must be proved to exist within the lines of the first before any later locator can enter between the boundaries of the first claim. *Atkins* v. *Hendree*, 328

MAP—See BOUNDARIES, 11.

MARRIED WOMEN—See CONTRACT, 25.

MASTER AND SERVANT.

1. *Master and servant liable as co-defendants.*—For injuries to a third party caused by the negligence of his servant, the master and servant are

MASTER AND SERVANT. *Continued.*

both liable and may be joined as defendants in the same action. *Wright* v. *Compton*, 189

2. *Municipal liability—Employer and contractor.*—The city of T. hired A. to quarry stone in its quarry, break the same to a certain size, pile it so that it could be measured, and to find the powder and tools for said work, all for $1 per perch. The city had no further control over A. in the work. The broken stone was for improving the streets of the city. A. in blasting the stone, set fire to and destroyed M.'s building. *Held*, that the city and A. sustained the relation of master and servant rather than that of employer and contractor, and that the city was liable for the injuries inflicted by A. *City of Tiffin* v. *McCormick*, 194

3. *Set of instructions.*—Certain instructions defining the rights and liabilities of master and servant *approved* (see statement of case for the instructions). *Sowden* v. *Idaho Co.*, 199

4. *New risks arising after original employment.*—The instruction, "That there is another qualification or exception to the risk which the servant assumes, and that is, he assumes no risk, except such as existed at the beginning of the employment and such as are incident to the business" should be qualified by words equivalent to these "or which existed during the course of the employment of which the employe had knowledge or was bound to have knowledge." *Id.*

5. *Mining company experimenting with giant powder.*—The plaintiff engaged in the service of a corporation as a miner. At that time ordinary blasting powder was used. Subsequently giant powder, a more dangerous explosive, was substituted by order of the president. The plaintiff was not informed of the proper mode of using it, although the corporation had printed directions. The plaintiff being injured by an explosion—*held*, that the corporation was liable. *Smith* v. *Oxford Co.*, 208

MEASURE OF DAMAGES.

1. *Contract controls price.*—Where work is done under a special contract fixing the price to be paid, the contract will control the price whether it be reasonable or not. The contract must govern where it can be made to apply. *Brigham* v. *Hawley*, 59

2. *Measure of damages in cases of negligence simply.*—The rule is to allow the actual damages, and it is error to instruct a jury that they may award smart money. *Moody* v. *McDonald*, 187

3. *Measure of damages.*—Upon a contract to deliver coal, at the plaintiffs' factory at a fixed price, the measure of damages for delivering an inferior quality of coal is the difference in value, at the factory, of the coal called for in the contract and that actually delivered; and since the coal was to be transported at plaintiffs' expense, the measure of damages for a failure to deliver at the time called for in the contract, the plaintiffs having consented to receive it later, was the difference between the actual charge for freight and insurance and the average rates during the period covered by the contract. *Merrimack Co.* v. *Quintard*, 346

4. *Measure of damages where there is no market.*—As there was no general market of sale for coal at the point of delivery, the measure of

MEASURE OF DAMAGES. *Continued.*

damages would be the price of coal in the market of sale, less the expense of putting the coal into market from the point of delivery, and the cost of mining and preparing the coal and transporting it to the point of delivery. *Hazleton Co.* v. *Buck Mt. Co.*, 989

5. *Measure of damages for converting securities.*—The measure of damages in trover for conversion of a note (or agreement to pay money) is the amount of plaintiff's interest in the same. *Penniman* v. *Winner*, 449

6. *Tunnel contract—Measure of damages.*—Upon an uncompleted contract for running a tunnel, the completion being prevented by reason ofnon-performance of conditions by defendant, the measure of damages is the contract price per foot for the actual number of feet run. *Monroe* v. *Northern Pacific Co.*, 652

See CONTRACT, 8; NEGLIGENCE, 1; TRESPASS, 1.

MINERALS.

1. *Reservation construed—Coke, the "produce of a mine."*—By an enclosure act reciting that the defendant was lord of the manors of A and B, it was enacted that nothing therein contained should be construed to defeat or prejudice his rights as such lord; but that the lord, his heirs and assigns, should hold and enjoy all manorial rights, and also all mines, minerals and quarries, etc., belonging to the said manors, in as full and ample a manner as if the act had not been made; "and also full and free liberty at all times hereafter of making, etc., and of granting to any other person or persons any wagon ways, or other ways in, over or along the commons or waste land (intended to be allotted and enclosed), and to do every other act now in use, or which shall hereafter be used or invented, which shall be necessary to be done for the purpose of winning, working, leading and carrying away the said mines, minerals and quarries within and under the said last mentioned commons, etc.; *and also for the leading, carrying and conveying the coals and the produce of any other mines and minerals from or under any other lands or grounds whatsoevr:*" *Held*, that the words, "produce of any other mines and minerals," did not mean the produce of mines and minerals *other than coals*, but the produce of mines and minerals other than the "mines, minerals and quarries" before mentioned; and, consequently, that the defendant had a right to use a railway constructed by him under the power so given to him, for the purpose of carrying *coke*, such coke not being made from coal worked out of the waste which was the subject of the enclosure. *Bowes* v. *Ravensworth*, 352

MINING CLAIM—See CLAIM.

MISTAKE.

1. *Tunnel to be completed by date certain—Mistake.*—Defendants agreed, among other things, to finish a tunnel by a certain date, and that if not finished within such time they would forfeit the contract, and all

MISTAKE. *Continued.*

moneys due on the same. The work was not finished until long after the time specified, but the defendants asserted that the length of the tunnel to be driven was much longer than the company represented, and the rock in the tunnel was found to be much harder than was anticipated, and harder than represented by the company. *Held*, that if the parties were mutually mistaken in regard to the length of the tunnel, and the time fixed was based on such mistake, the stipulation as to the time would be void, and the defendants would have a reasonable time in which to complete the work. Or, if the company represented the tunnel to be shorter than it really was, and the defendants believed such representations to be true and acted thereon in fixing the time of completion, then the clause as to time and forfeiture would be void, and defendants would be entitled to a reasonable time. *Verzan* v. *McGregor*, 565

See BOUNDARIES, 6.

NEGLIGENCE.

1. *Damages for pain and anxiety.*—In an action for damages on account of physical injury, the jury, in estimating the amount of damages may consider, and may be instructed to consider, the suffering and anxiety of mind of the plaintiff, caused by the injury, without special allegation of such suffering and anxiety in the complaint. *Wright* v. *Compton*, 189

See BLASTING, COMMON CARRIER, 2; MASTER AND SERVANT.

NEW TRIAL.

1. *Requisites of newly discovered evidence.*—Newly discovered evidence, upon which a new trial is sought, must not be merely cumulative, nor such as could readily have been obtained at the original trial; it must be material and not in the mere nature of impeachment of a witness; and so important that it may reasonably be inferred that it would, if produced, result in a different verdict. *Stoakes* v. *Monroe*, 246

NOTICE—See CORPORATION, 8; DEPOSITION, 1.

OFFICER—See CORPORATION, 4.

OIL—See CONSIDERATION, 1; CONTRACT, 31; DELIVERY, 3; WEIGHTS AND MEASURES, 1.

OPTION—See BOND, 1, 2; CONTRACT, 29, 46.

PARTIES.

1. *Refusal of nominal plaintiff to authorize suit.*—The fact that the nominal plaintiff, who sues for the use of another, testifies on the trial that he did not allow the use of his name, can not prevent a recovery. *Kimmins* v. *Wilson*, 159

2. *Parties to an action.*—Persons owning no interest in the property in controversy, and having no interest in the event of a suit, are not neces-

PARTIES. *Continued.*

sary or proper parties thereto. *Houts* v. *Gisborn*, 340

3. *Order to bring in other parties.*—The court may, under section 17 of the Practice Act, order any other parties to be brought in if it can not determine the case in their absence. *Id.*

4. *Assuming debt as consideration—Parties.*—A party, upon the purchase of mining claims, agreed in writing, as part of the consideration, to pay the debt of his vendor to a third party. *Held*, that suit was rightfully brought against such purchaser by the third party in his own name. *Wiggins* v. *McDonald*, 564

5. *Parties not interested.*—In an action for breach of contract, parties who have no interest in the suit are not proper parties, and a demurrer for their non-joinder was erroneously sustained. *Barber* v. *Cazalis*, 684

PARTNERSHIP.

1. *Mining partners—Powers.*—If there be partnership property, and also separate property of a deceased partner, the partnership debts are to be paid out of the proceeds of the joint estate, and the individual debts out of the proceeds of the separate estate. In the exercise of equitable jurisdiction in the allowance of claims, county courts are strictly restrained from infringing on this rule. The reason assigned for the distinction between the ordinary commercial partnership and a mining partnership, and for limiting the powers of the partners of the latter class, is that a mining partnership is not founded on the *delectus personæ*, whereas the other class is. The powers of members and managers of mining partnerships are limited to the performance of such acts in the name of the partnership, as may be necessary to the transaction of the business, or which is usual in like concerns. *Charles* v. *Eshelman*, 65

2. *No power to bind associates to payment of counsel.*—The employment of counsel to litigate the title to the mine does not come within the limited powers vested in a mining partner, but this rule does not apply to incorporate mining associations, nor to partnerships formed under the statutes. *Id.*

3. *Sale by partner valid unless fraudulent.*—For the purpose of selling the effects and paying partnership debts, each partner is considered the authorized agent of the firm, and unless he acts fraudulently, or in violation of an agreement or term of the partnership, and the party with whom he deals knows the fact, courts will not interfere. *Boswell* v. *Green*, 363

4. *Working for an interest.*—A contract by which a party agrees to superintend the driving of a tunnel, for an interest therein, does not constitute him a partner with his employers. *Barber* v. *Cazalis*, 684

See CORPORATION, 1.

PLEADING.

1. *Replevin—Inducement—Issue upon title to coal.*—To an action in replevin against a sheriff, he pleaded property in the defendant in the executions under which he took the goods, and alleged the *precise*

PLEADING. *Continued.*

time when he received the executions and when he seized the property, and that the goods were *then* the property of the defendant in execution; the plaintiff traversed by replication in the usual form and issue was thereupon joined. The jury found that, *at the time alleged in the declaration*, the property in the goods was in the plaintiff. Upon objection that the jury had not passed upon the issues made by the pleadings, *held*, that the allegations relative to the time of the seizure were merely matters of inducement and that the response of the jury, that the property was in the plaintiff, directly met and decided the issue of fact. *Boswell* v. *Green*, 362

2. *Surplusage in pleading.*—Where a complaint taken as a whole states a good cause of action, unnecessary statements and allegations may be regarded as surplusage. *Houtz* v. *Gisborn*, 340

3. *Too general denial construed as specific admission.*—Plaintiff objected to the admission of a contract in evidence on the ground that it was not the contract of a certain ditch company. The company, a party, in its answer denied that "it ever entered into any such contract as is set forth in the defendant's cross-bill, etc." *Held*, that this was not a specific denial that the company was the real party to the contract, and was, therefore, an admission that it was such party, and that it was not error to overrule the objection to the evidence. *Verzan* v. *McGregor*, 566

4. *Videlicet.*—The amount agreed to be paid being laid under a videlicet, it is not necessary to prove the exact sum stated. *Beard* v. *Converse*, 670

5. *Order on demurrer construed.*—A complaint which stated two causes of action being filed, the defendant demurred to the whole complaint on the ground of defect of parties, and also to the first cause of action on the ground that the facts stated were insufficient to constitute a cause of action; the demurrer to the plaintiff's complaint was sustained and judgment entered for the defendant. *Held*, that the natural import of this record is that it was the demurrer to the whole complaint which was sustained, else the judgment would not have been for the defendant. *Barber* v. *Cazalis*, 684

6. *Another action pending.*—Where another action between the same parties is pending, a plea to that effect will cause a dismissal of the second suit. *Davis* v. *Flagstaff Co.*, 661

7. *Pleading a conclusion of law.*—An averment that certain persons became subscribers to the capital stock of a corporation by signing and delivering an agreement is not a statement of fact, but a mere conclusion of law. *Wheeler* v. *Floral Co.*, 622

See AMENDMENT; STATUTE OF FRAUDS, 2.

POSSESSION.

1. *Possession of mining claims.*—The possession of mining claims is regulated by usage and local rules and *possessio pedis* can scarcely be required to give a right of action for the invasion of it. When the limits of the claim are defined and one enters in pursuance of the mining

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POSSESSION. *Continued.*

rules or under color of title, the possession of a part as against any but the true owner or prior occupant is possession of the whole; nor would a third person have a right to invade such possession and set up title in a stranger with which he had no connection. *Attwood* v. *Fricot*, 305

PRACTICE.

1. *Probate practice—Jury.*—Under the statute (Gen. Laws, § 2918) claims against an estate may be tried in the county courts before a jury, and without formal pleading, as in ordinary trials before a justice of the peace. The fact that a county judge is permitted to exercise an equitable jurisdiction in the allowance of claims does not deprive the litigants of the right of submitting facts to juries; at least in actions not purely equitable. *Charles* v. *Eshelman*, 65

2. *Notice of motion.*—A notice of motion for new trial was served upon Mr. R. who had been recognized by Mr. B. as associate counsel with him in the cause. Mr. B. objected that no notice had been served upon plaintiff's attorney of record. *Held*, that Mr. B.'s acts constituted a waiver and his objection came too late. *Sowden* v. *Idaho Co.*, 199

3. *Practice—Bill of exceptions.*—If the bill of exceptions does not purport to contain all the evidence the Supreme Court can not inquire whether the verdict of the jury is supported by the evidence or not. *Gordon* v. *Darnell*, 220

4. *Presumptions in favor of certified Statement.*—Allowing to the judge's certificate the presumptions in its favor, it implies that a Statement was presented, the objections thereto considered, and that it conformed or was made to conform to the truth. *Overman Co.* v. *American Co.*, 251

5. *Coin contract.*—Upon a contract which called for payment in gold coin, suit was brought and verdict returned for plaintiff, without specifying the kind of money to be recovered. *Held*, that judgment was properly rendered for gold coin. *Winans* v. *Hassey*, 285

6. *Exceptions too general.*—Exceptions to the admission of evidence, which do not specify the ground of objection, will not be considered. *Id.*

7. *Presumption of injury from erroneous charge.*—The error in a charge to the jury being apparent, injury is presumed, and the presumption should be affirmatively replied to. *Attwood* v. *Fricot*, 305

8. *Error not in record.*—The court can not notice matter alleged for error, unless it appears on the record. *Boswell* v. *Green*, 363

9. *Joinder of counts in trover and assumpsit.*—It is no ground for a motion in arrest of judgment that defective counts in assumpsit are joined with a good count in trover. *Penniman* v. *Winner*, 449

10. *Defective common counts.*—The words "money payable," are material in the count for money received. A count for "amounts stated," will not be treated over objection as for "accounts stated." *Id.*

11. *Practice Act governs all actions, both in law and equity.*—The practice, pleadings, forms and modes of proceeding of the courts in this Territory, were intended by Congress to be left to the legislative action of the Territorial legislature. Since the adoption of the Code of Procedure

PRACTICE. *Continued.*

in Utah there does not exist any such thing as a chancery proceeding separate and distinct from a legal proceeding. The code applies and governs all pleadings, modes and forms, both at law and equity. *Houtz* v. *Gisborn*, 340

12. *Appearance waives process.*—A general appearance waives any informality as to the process upon which parties are brought into court. *Id.*

13. *Waiver of objections to bill.*—An objection to a supplemental bill in equity on the ground that it seeks to maintain the suit upon facts which have occurred since the filing of the original bill is waived by omitting to demur to it upon that ground, and consenting to go into a full hearing before a master upon the merits of the case as set forth in the original and supplemental bill. *Pinch* v. *Anthony*, 593

14. *Rule as to affirming report of referee.*—If the report of a referee be unsupported by the evidence before him, or if the referee must have contravened some rule of law in reaching his conclusion, the report should be set aside; but if it is not against the evidence in the case, and no rule of law has been violated, it should stand. *Fitch* v. *Archibald*, 555

15. *Bill of exceptions.*—A bill of exceptions should state the ground of objection to evidence, and if the record go up on a general objection only, the ruling of the court will be sustained if the evidence be proper for any purpose. *Cullum* v. *Wagstaff*, 573

See AMENDMENT, 1, 2; APPEAL; ASSUMPSIT; CONFUSION, 2; JUDGMENT; NEW TRIAL; VERDICT.

PROSPECTING CONTRACT.

1. *Bond to find coal—Sufficient search.*—Lessees of land and of coal found or to be found, covenanted to sink for coal as far as could and ought to be accomplished by persons acquainted with the nature of collieries, etc., and gave bond to pay such damages as umpires should award against them for breach of such covenant. The umpires awarded a certain sum in damages, and that lessees should sink pits, etc., in endeavor to find coal by a certain time. Defendants paid the damages and averred full efforts to find the coal and that none existed such as would pay for working. *Held*, that the plea showed a full compliance with the award, but leave was given to take issue on the sufficiency of the experiments. *Hanson* v. *Boothman*, 217

2. *Prospecting contract—Executed and executory.*—Where plaintiffs, mine owners, conveyed an interest in their mines to defendants, in consideration of a contract signed by defendants, to open the mines, etc., it is a contract executed by the plaintiffs, executory by the defendants, and such contract is valid against the defendants, though not signed by the plaintiffs. *Luckhart* v. *Ogden*, 601

See SALE, 1.

RECEIVER.

1. *Appointment of a receiver for corporation.*—Courts of equity have

RECEIVER. *Continued.*

no power to appoint a receiver for a corporation in the absence of a statute conferring such power. *Davis* v. *Flagstaff Co.*, 661

RECORD.

1. *Records as evidence.*—The record of the transfer of a mining claim is admissible in evidence to show compliance with the miners' rule requiring such record, but not to prove the fact of the transfer. *Attwood* v. *Fricot*, 305

2. *Defined.*—What constitutes the record at common law, stated. *White* v. *Toncray*, 463

3. *Pleas rejected.*—Pleas tendered but rejected by the court are not a part of the record, unless made so by bill of exceptions: a memorandum that the matter thereof might be allowed in evidence, and that this was done at the trial does not make the rejected pleas part of the record. *Id.*

4. *Idem.* If pleas be rejected and no exception saved, the defendant shall be presumed to have acquiesced. *Id.*

RECOUPMENT—See SET-OFF.

RESCISSION.

1. *Mortgage—Time—Non-user.*—M., in 1840, sold to H. the exclusive right to mine, etc., on part of his land, at a named rate per ton of ore; in 1851 M. sold his whole tract to Y. and took a mortgage for the purchase money, part of which was payable on a day named, "upon consideration that the title to the land be by that time assured and confirmed"; and particularly that the above mentioned agreement with H. be rescinded, otherwise not to be payable till the title was fully assured. A *scire facias* upon the mortgage was sued out May 2, 1864, and tried Dec. 22, 1864. *Held*, that no presumption of abandonment of H.'s right under the agreement by reason of non-user, had arisen either at the commencement of the suit or at the trial. In 1840 the right began, but as it was in 1851 by the terms of the mortgage treated as a subsisting incumbrance, the court must consider whether there has been a lapse by non-user since the last mentioned date. And it must be treated as still not "rescinded," as required by the terms of the mortgage, notwithstanding the judicial construction given to this same agreement of H., wherein it was declared lapsed in a case between other parties, (*Clement* v. *Youngman*) in this same court. *Youngman* v. *Linn*, 443

RESERVATION—See MINERALS, 1.

SALE.

1. *Sale of prospector's interest—Outfit.*—Jones was one of a company organized to go to California. He owned a share and a half in the outfit. By writing, he sold to B "one half of his interest in the company," qualified afterward by a claim that B should not be a partner in the company, but only purchaser of one half of Jones' interest in the "metals and ores" to be obtained. *Held*, no conveyance of any part of Jones' interest in the

SALE. *Continued.*

outfit. *Phillips* v. *Jones' Adr.*, 522

2. *Deduction of duties from purchase money.*—When merchandise is sold to be delivered at a particular place free of charge, the vendee may pay any government duties required to be paid before delivery, and deduct the same from the purchase money. *Fitch* v. *Archibald*, 555

See COAL, 1; PARTNERSHIP, 8.

SET-OFF.

1. *Recoupment, when allowable between lessor and lessee.*—In an action by a lessee against the lessor, it appeared the subject of the lease was a coal mine, and the lessor, under a provision of the lease, had resumed possession of the leased property before the end of the term for non-payment of rent, and because the mine was not being worked to his satisfaction. The lessee sued to recover for certain mining tools and other property belonging to him, which were taken by the lessor when he terminated the lease, and also for the erection of a blacksmith shop and other buildings: *Held*, that the defendant in the action, the lessor, could recoup in this suit such damages as he had sustained by reason of the mine having been unskillfully worked by the lessee, in violation of the covenants in the lease, it being regarded that the subject-matter of the plaintiff's claim arose out of the lease. Nor would this recoupment as against the plaintiff, who was the sole lessee, be affected by the fact that after taking the lease, the lessee had associated others with him in working the mine, as he was liable under his covenants for injury to the property, whether occasioned by himself or by those connected with him in the business. *Williams* v. *Schmidt*. 23

2. *Recoupment.*—Mutual demands arising out of the same subject-matter, although one arises *ex contractu* and the other *ex delicto*, capable of being balanced against each other, may be adjusted in one action. *Brigham* v. *Hawley*, 59

SIDE LINES—See BOUNDARIES.

SPECIFIC PERFORMANCE.

1. *Parol waiver.*—A written contract to sell and convey certain premises may in equity be waived by parol, but such parol waiver must be clear and explicit, and the refusal of one of the parties to accept of a conveyance, unless the premises were described according to his understanding of the contract, is not such a waiver, and he may insist upon a specific performance of the contract. *Huffman* v. *Hummer*, 242

2. *Laches—Law and equity.*—A party who has a contract for certain premises, the price to be paid on the execution of the conveyance, is not bound at law to pay or to offer to pay until the deed is properly executed; equity requires one seeking a specific performance to show himself ready to perform, but the refusal of the other party to convey, dispenses with any further tender of money or readiness to perform. *Id.*

STATUTE OF FRAUDS.

1. *Payee of bill—Statute of frauds.*—The statute of frauds has no application in suits on an acceptance. In a suit by the payee of a bill of exchange against the acceptor, the question as to the consideration between the drawer and acceptor can not be inquired into. *Laflin Co.* v. *Sinsheimer*, 167

2. *Statute of frauds, how pleaded.*—It is a general rule, if a party would avail himself of the statute of frauds as a defense, he must plead it, but when the declaration contains only the common counts and yet the plaintiff seeks to recover for the agreed price of realty, the statute may be relied upon as a defense under the general issue, because it can not be known before the evidence is introduced that any contract within the statute will be proved; but the contract as above set out is not within the statute, and the question of the statute of frauds does not arise in this case. *Beard* v. *Converse*, 670

See CONSIDERATION, 2.

STOCK.

1. *Contributories liable for previous debts.*—Shareholders in a trading company are liable to contribute on the winding-up for debts incurred previous to, as well as for debts incurred after, their purchase. *Mexican Co., In re*, 36

2. *Contributories — Executory contract.*—Parties (Grisewood and Smith) held by a binding contract for the purchase of shares at the date of the winding-up order, such executory contract being, further, afterward completed, are liable as contributories. *Id.*

3. *With stock, quantity is equivalent to identity.*—It is not incumbent upon bailees of stock upon a redemption of the pledge, to return the identical certificates pledged; it is sufficient to restore certificates of stock corresponding to those received. *Thompson* v. *Toland*, 77

4. *Conversion of mining stocks.*—H. delivered to D., as collateral security, certain mining stocks assigned in blank, which D. filled up in his own name, and thereupon had new certificates issued to him. D. afterward transferred part of this stock, but took back blank assignments for the same, and the balance he transferred to E. as trustee. It also appeared that the stock remained under the control of D., and ready to be delivered to H. upon payment of his notes. *Held*, that the rights of H. had not been violated, and that the acts of D. did not amount to a conversion. *Day* v. *Holmes*, 276

5. *Sale of mining stock—Dividends—Parol proof to explain.*—On September 22d, B. sold to L. two shares of mining stock, with all dividends made after the morning of the 23d September. Both parties expected a dividend would be declared on the 22d, but the trustees did not in fact declare it until afternoon of the 23d, and it was paid to L. Upon suit brought by B. to recover the amount of the dividends, it was *held* that parol evidence was properly admitted to explain the transaction and point its true meaning. *Brewster* v. *Lathrop*, 552

6. *Stock—Issue to defaulting contractor.*—The issue of the stock of a

STOCK. *Continued.*

mining company to a firm which had subscribed to stock of a railroad company, and had entered into a contract with the railroad company to build a part of its road at the request of the mining company, the issue being approved by both directors and stockholders, is valid, although the contract to build the road was never carried out, and although the company may be in equity entitled to a return of its stock. *Savage* v. *Ball*, 579

See BAILMENT 1, 2; BROKER, FRAUD, 5, 8.

STONE—See CONTRACT, 1, 19, 30.

SUBSCRIPTION—See CONTRACT, 2, 3, 35, 36.

SURFACE—See LODE, 1.

TIME.

1. *Extension.*—Where an executory contract for sale of mines was accompanied by a covenant on the part of the purchaser to open them, and an extension of the time was alleged to be proved by certain letters produced, *held*, that the court must determine as matter of law the effect of such letters, and whether they referred to an extension of all the terms of the contract, or related specially to an extension of time to open the mines only. Second, that an extension of time in general terms would relate to all the terms of the contract. *Luckhart* v. *Ogden*, 602

2. *Reasonable time.*—A contract for an extension of time being silent as to the duration of such extension, the law implies that it shall be for a reasonable time, and the question, what is a reasonable time, is one of law to be determined by the court from the facts. *Id.*

3. *Reasonable time—Question for the jury.*—If a contract is silent as to the time within which an act is to be performed, the implication is that it should be done within a reasonable time, and what is a reasonable time is a question for the jury to determine. *Shepler* v. *Scott*, 674

4. *Evidence to vary contract.*—Evidence that a written contract was limited by parol to a particular time must be both positive and clear. *Id.*

See RESCISSION, 1.

TITLE BOND—See BOND.

TRESPASS.

1. *Damages for trespass.*—It is error to instruct a jury that if they believe no injury or damage was done by defendants to plaintiffs, they should find for defendants. The law presumes damages from a trespass. *Attwood* v. *Fricot*, 305

TROVER—See PRACTICE, 9.

TRUST—See ATTORNEY AT LAW.

TUNNEL—See MEASURE OF DAMAGES, 6; MISTAKE, 1; PARTNER, 4.

USAGE.

1. *Usage in coal trade—Presumption.*—C. & S., who sold coal for the Pa. Coal Co., in so doing employed S. &. M., coal brokers, and paid them commissions, which were charged to the Pa. Coal Co., and on settlement were paid by it. Upon suit brought to recover these commissions alleged to have been improperly charged, it was *held* that C. & S. might show it to be the usual and customary method of the Philadelphia coal trade to sell through the agency of brokers, to whom a commission was paid, and that this proof was substantially the same as proof of an established, uniform and general custom; *held, also*, that the usages of a particular trade are presumed to be known to those engaged therein. *Carter* v. *Philadelphia Co.*, 287

See BILLS AND NOTES, 17; BROKER, 3; FRAUD, 5.

VERDICT.

1. *Presumption in favor of verdict.*—On motion for new trial, because the verdict is contrary to the evidence, the evidence being conflicting, all inferences from the testimony which the jury might, without error, have drawn, are to be accepted in favor of the verdict, and the conflicting testimony and the inferences therefrom are to be discarded. *Kimmins* v. *Wilson*, 159

2. *Verdict, how recorded.*—A verdict for $2,500 actual damages and $2,500 smart money should be recorded as rendered and not as an entire verdict for $5,000. *Moody* v. *McDonald*, 187

3. *New trial—Conflicting evidence.*—The appellate court will not overrule an order of the court below refusing a new trial when the evidence is conflicting. *McGarrity* v. *Byington*, 311

4. *Entitling verdict.*—It is not necessary that a verdict should be entitled. *Id.*

5. *Referee's report equivalent to verdict.*—The report of a referee is entitled to the same weight as the verdict of a jury upon the facts of the case. *Fitch* v. *Archibald*, 555

WARRANTY.

1. *Quality.*—A mere statement in a bill rendered regarding the quality of iron can not be relied upon as a warranty of its quality. While no particular words are necessary to make a warranty, such expressions must be used as to show an intention of the party to bind himself by the representations made. *Carondelet Iron Works* v. *Moore*, 625

WATER.

1. *Servitude.*—Purchaser of ditch partially constructed takes subject to servitude contracted by grantor. *Highland Co.* v. *Mumford*, 3

2. *Distribution of water among colonists*, and mode of measurement of water stated, in the agreed case and in the opinion of Beck, J., which was affirmed. *Id.*

3. *Diversion of water.*—Defendants appropriated the waters of Oro

WATER. *Continued.*

Fino Creek in 1865. In 1867 plaintiffs appropriated the same water to operate a mill at a point 1¼ miles above, but returned it to the creek above defendant's dam and ditches. In 1869 defendants diverted the water at a point above plaintiffs' mill. *Held*, that the appropriation in 1865 below the site of the mill did not justify the diversion above the mill in 1869. *Columbia Co.* v. *Holter*, 14

See APPROPRIATION.

WEIGHTS AND MEASURES.

1. *Oil barrels.*—Where a defendant has contracted to deliver a number of barrels of oil, but of no specified capacity, it is for the jury to determine whether the contract was fulfilled by a delivery of a less number of vessels of a greater capacity than the statute barrel; and it is not error (no specific instruction to the effect that in the absence of a standard fixed by the parties the statute standard must govern, having been prayed for) to leave the whole question to the jury, there being evidence showing that the oil barrel in common use contained a different number of gallons (40) from the statute barrel of thirty-one and a half gallons. *Cullum* v. *Wagstaff*, 573

WORKINGS—See BARRIERS; COLLIERY, 5; FAULT, 1.

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